- 9 2007

No. _____

In the
Supreme Court of the United States

ESTATE OF DOROTHY L. MORRISSEY

AND

MICHAEL J. MORRISSEY,

Petitioners,

v.

ROBERT LESNIAK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ESTATE OF DOROTHY L. MORRISSEY
BY: MICHAEL J. MORRISSEY, ITS ADMINISTRATOR
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QUESTIONS PRESENTED

I. When a district court finds that no defendants in a case were properly served with process, can it without personal jurisdiction over defendants proceed to rule dispositively in dismissing the case with prejudice and proceed further to impose sanctions against plaintiffs?

II. Whether an order entered is a final order for appeal purposes, or an interlocutory order, where the district court fails to rule on matters still before the Court? And specifically, where the unaddressed matters include not ruled on requests for declaratory judgment, and the order (a) fails to identify docket numbers of cases to which the order applies (where consolidation of certain, but not all, cases below is unclear), (b) fails to state names of individuals that are to be paid "$10,000 each" by plaintiffs under Rule 11 (where none were served and some never appeared with any case filing, although named as a defendant in the Complaint), and (c) fails to state a total amount of Rule 11 sanctions being assessed by the order.

III. Whether it is error for a court of appeals to inject new matter into the Record of a case before it on appeal; and specifically on the denial of a motion for relief from judgment, whether a court of appeals is permitted to inject on its own a Rule under which the district court acted to dismiss a case where the district court itself gave no reason (and cited no Rule) for the dismissal.

IV.(A) Whether it is error to impose Rule 11 sanctions not based on a signed pleading? And related, is the question, Whether it is error to impose Rule 11

sanctions based on matters that are not before the Court in the instant case?

(B) Whether a district court can impose as sanctions under Rule 11 without any analysis or statements as to the basis for the amount and how it was calculated? Without stating the basis for imposing the Rule 11 sanction in the amount ordered? Without stating a total amount of sanctions being assessed per the order under Rule 11? Without naming the individuals to whom an amount under the Rule 11 order is to be paid? And without considering the numerous factors required in Rule 11 to be evaluated in connection with the assessment of any amount, with these including as one factor the ability of a party to pay?

V. Whether it is error for a district court, in a matter multiple cases consolidated for hearing purposes, and where each case is comprised of multiple causes of action, and where further there are approximately 63 defendants involved, to dismiss all cases, as to all causes of action, and as to all defendants based on a statute of limitations argument, with no evidence is taken to establish an evidentiary record, no findings of fact such as a start date and an end date is made, the limitation period for each cause of action is not identified, and without evidence admitted in the case on the issue, but rather with only the conclusion that all cases are dismissed based on the statute of limitations?

PARTIES

All parties to this action are listed in the caption of the case in the Court of Appeals opinion, attached as Appendix A, p. 1a.

CORPORATE DISCLOSURE

There are no corporate issues in this case.

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court. The District Court's Order (App. C, p. 12a) references other cases but they were not, and are not, matters before the Court in the present case. In fact, reference to other cases by the District Court was due to defendants' effort to bring in such extraneous matter, and is cited as one reason why this Writ should be granted ("Reasons" No. II, *infra*). The causes of action presented in the Complaints of the present case have never been heard on their merits so there are no related cases in that regard.

OPINIONS BELOW

Both the District Court and the Court of Appeals' opinion or decision below in this case were not published.

JURISDICTION AND AUTHORITY

Eight cases were filed in the U.S. District Court in Norfolk, Va. presenting causes of action based on federal questions and statutes, and with pendent State causes of action. A ninth case was subsequently filed. (The status as to what cases the present order applies is uncertain, as the applicable case docket numbers are not listed in the District Court's order.) The district court's ruling was appealed to the appropriate appellate court, being the Court of Appeals for the Fourth Circuit. This court has jurisdiction under Rules 10-14 of Supreme Court Rules.

STATEMENT OF THE CASE

Mrs. Morrissey was inhumanely and illegally in her absence subjected to a "Guardianship" even though she had a lawfully named Power of Attorney prepared in a formal document by a law office. During the three year period that followed, she was effectively imprisoned with all her rights taken from her, along with all her property, including her home of over thirty years. Most painful, Mrs. Morrissey was essentially isolated, from her family, her many close friends and from her church. She was forced to suffer the most indescribable and inhumane pain, which ended with her death after having been moved hours away from her hometown of Richmond, Va., thus increasing the isolation and its effects during her last days. A criminal investigation resulted, first by the Virginia State Police after the State Medical Examiner had reviewed aspects surrounding her death. Later, the U.S. Attorney's office joined, making it a joint State and Federal criminal investigation into the "unnatural" (per the State Medical Examiner) death of Dorothy Morrissey.

The present case was filed as a civil action that grew out of this treatment. Actually eight separate cases were filed to keep each case manageable. A ninth case was later filed, all in the U.S. District Court in Norfolk, Va. The cases assert multiple causes of action, against multiple defendants, based on the actions and inactions of each during the torturous three year period of Mrs. Morrissey's captivity, and which have continued thereafter as to other matters connected with her estate. At all times, Mrs. Morrissey was a legally competent adult.

Procedurally, the USDC, Norfolk, transferred all eight cases to the USDC Richmond and, just as plaintiffs knew

prior to filing the cases in the USDC, Norfolk, Va., all judges in the USDC Richmond recused themselves from the case due to conflicts. Then, instead of transferring the cases back to the Norfolk USDC as the applicable rules on Venue require, the cases, for unknown reasons where transferred to the USDC Alexandria. Later, a substitute judge from New York State was assigned to the cases that all intimately involved Virginia substantive law, including the Virginia law as to statute of limitations.

The ninth case, although never acted on by plaintiffs, was transferred, *sua sponte,* by the Norfolk USDC, to Richmond, and from there to the USDC Alexandria. Plaintiffs contacted the USDC Norfolk for purposes of making service within the required time on defendants, and were told then by the clerk that the case was transferred by the Court on its own.

STATEMENT OF THE ISSUES

1. The Orders in this case below are void *ab initio* due to lack of jurisdiction.

The district court specifically ruled in its Order (App. C, p. 12a) that none of the defendants were properly served. This was a favorable ruling to defendants that protested service before the district court. Hence there was never personal jurisdiction in the case and the law is clear, anything that follows is void from the start.

2. The district court's order, because it did not address and rule on all matters in the case before that court, was not a final order and it is reversible error that it was treated as being a final order.

The district court left unaddressed and not ruled on, plaintiffs' request for declaratory judgments. It did not name the individuals that were to receive the Rule 11 sanctions imposed. It did not state the total amount of the Rule 11 sanctions imposed, saying only that it was $10,000 per defendant. While this totals $630,000 for 63 defendants, it is unclear, and not ruled on, as to what defendants are referred to, significant where the same order rules that none of the defendants was served with process, and a number of named defendants never participated in any case proceeding.

The district court also failed to address the ninth case that was later filed apart from the earlier eight. The USDC Norfolk, on its own, and before plaintiffs had done anything more than file the case, transferred the case to the USDC Richmond, a fact plaintiffs first learned of when they contacted the court about making service of process, done within the allowed time period for them to do this. This is prejudicial error for a court to so act when the next step, be it making service or a decision to abandon the case and not make service, is one solely for the plaintiff. The court did not even have personal jurisdiction in the case. The USDC in Alexandria, through a visiting New York State judge, failed to address this issue, adding further grounds in support of this not being a final order, but rather an interlocutory order, and the case should be remanded for this reason.

3. The Court of Appeals erred by injecting new matter into the record by adding, on its own, a Rule under which the district court acted when the district court never so stated any Rule itself.

The district court denied plaintiffs' motion for reconsideration and relief from judgment. It did not state any reason. (App. B, Order, p. 10a). Plaintiffs had argued their motion under Rule 59 and argued on brief as to the same Rule 59 basis for the relief sought. (App. D, Brief, p. 16a). Yet, the Court of Appeals added on its own that the denial of the motion was under Rule 60, this being to the severe prejudice of plaintiffs for Rule 60 allows for a full year for in depth preparation in bringing a Rule 60 motion. This violates the most fundamental rule of law, namely, that an appellate court reviews the Record before it. It is reversible error for it to add new facts, new matter on its own that is not in the Record from the lower court.

4. Violation of Rule 11, in terms of both its substantive and its procedural requirements.

The district court assessed over half a million dollars against plaintiffs. The Estate has no cash, no personal effects, no real estate. The imposition of any Rule 11 sanction violates the well established rule that Rule 11 action must be based on a signed pleading and this was not. The order is clear in its tone, that this was prompted from other matters, not before the court, not involved in the causes of action of the present case, but were made as argument of counsel. No evidentiary record was ever established here through Discovery. This was clearly not a Rule 11 situation and it was error for the district court to take this action.

Related is the error in the amount of the sanctions imposed. This violates most all the procedural and substantive requirements established under Rule 11 as to amounts awarded, one of which is the requirement that the ability of the party to pay be taken into account, and that the amount be itemized and explained. None of this was done. The amount is arbitrary, unsupported, violates established rules and procedures under Rule 11, and is bankruptcy-loaded, and constitutes reversible error.

5. Violation of the requirements under a statute of limitations ruling

All cases, all causes of action in each case, and as to all 63 defendants were dismissed, and with prejudice, by the district court simply with the statement that they all are dismissed under the "applicable" statute of limitations. What are the applicable statutes of limitations were not stated, nor was the fact finding process of finding corresponding start and end dates. No analysis or fact finding of any kind was done in the district court's order (App. C, p. 12a). No evidence was introduced; no Discovery, and no evidence of record existed. The action is unsupported and must be reversed.

STATEMENT OF THE FACTS

The relevant facts of these consolidated cases is the background, briefly given above. The case in court consisted of only one signed pleading of plaintiffs, that was the Complaint filed in each case. This is significant to the Rule 11 issue, which is required to be based on a signed pleading, and the district court never faulted in any way the Complaints as to the merits of the causes of actions asserted therein. Significant further is that while other matters were moaned about by defendants in trying to cast a cloud with things not

before the district court, the words *res judicata* were never used, because the causes of actions asserted have never been heard on their merits. Facts of the court case are the Complaints followed by defense motions, with the district court granting the statute of limitations motion, discussed above, and dismissing everything simply by fiat, and no fact finding or properly adduced evidence of any kind. It all went on argument of the "grouped" defense counsel, who in essence echoed the "I agree with everything the other defense counsel said" type of defense.

Thereafter, plaintiffs moved for reconsideration and relief from judgment (denied) and appealed their case to the Court of Appeals whose Opinion denied the appeal. The rulings of both Courts are faulted in their failure to make reasoned decisions but rather stating conclusions in a case where there is no evidentiary record. It is this glossary treatment of a case centered around the most serious wrongful and painful death of an innocent competent person that plaintiffs submit represents a violation of existing law and procedure and constitutes reversible error, such that this case must be reversed and remanded to provide plaintiffs with their lawful right of Discovery in such an extreme personal and prolonged abuse for which Mrs. Morrissey paid the ultimate price, and in an immensely painfully way.

Other facts of the case are presented in plaintiffs' brief of Appendix D, p. 16a, as well as the brief of Appendix E, p. 81a.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DISMISSING THE ENTIRE CASE, INCLUDING ALL CONSOLIDATED CASES, ALL CAUSES OF ACTION SET FORTH IN EACH CASE, AND ALL OF THE MULTIPLE DEFENDANTS IN EACH CASE, BASED ON THE SOLE CONCLUSORY STATEMENT, MADE WITHOUT ESTABLISHING ANY EVIDENTIARY RECORD FIRST, THAT THE ACTIONS WERE NOT FILED UNDER "APPROPRIATE" STATUTE OF LIMITATIONS

The district court made no statute of limitations analysis with regard to its dismissal of all cases, to all causes of actions asserted in each case, and to all defendants in each case, based on statute of limitations. Under Virginia law, "A federal district court's selection of a state statute of limitations follows a two-part analysis of first selecting the statute most analogous to the federal claim and then determining whether the application of that period is consistent with the federal statute and its underlying policies." *Bernard v. School Bd. of City of Norfolk,* 58 F. Supp. 2d 669 (E.D. Va. 1999). The district court in the present case made no analysis. It dismissed everything, all causes of action, as to all defendants, in all cases, with the conclusion statement that plaintiffs have "failed to have filed the actions . . . within the appropriate statute of limitations." (June 7, 2006 Order, 2nd paragraph, lines 4-5). No case numbers are given, no defendants are named, no causes of action are distinguished as to what applicable statute of limitations is to apply, and what is the "appropriate" statute of limitations used in the district court's ruling is never stated, much less the subject of any analysis as per *Bernard v. School Bd. of City of Norfolk, supra.* This action thus conflicts with

Fourth Circuit case law as to the analysis required in a statute of limitations issue.

Plus, and most importantly, cases of action were timely filed with the applicable limitation periods.

Deciding a statute of limitations question requires a fact finding process. Plaintiffs are not asking in this petition that the Court review findings of fact in this regard, but rather, that there were no findings of fact, an integral part of deciding a statute of limitation question. In addition to the conflict the action in the present case creates in the Fourth Circuit's handling of the SOL issue, one example being *Bernard v. School Bd. of City of Norfolk, infra,* this action also creates sharp conflicts with decisions of other Circuits on the same S/L issue.

In *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578 (C.A.9 Cal. 1981), the court held that the computation of time provisions were "an integral part of the statute of limitations." West's Ann. Cal. Code Civ. Proc. § 340(3); West's Ann. Cal. Gov. Code, § 6700; Fed. Rules Civ. Proc. Rule 6(a), 28 U.S.C.A. *See also, Sain v. City of Bend,* 309 F.3d 1134 (C.A.9 Or. 2002) as an example of an analysis required in making a statute of limitations determination.

A court of appeals reviews de novo a district court's determinations with respect to the statute of limitations. *Harvey v. Waldron,* 210 F.3d 1008, 1013 (9th Cir. 2000). It is apparent from the court of appeals Opinion in the present case that no such review, fact finding and legal conclusion as to the different causes of action, different defendants and different cases was made, and this constitutes reversible error.

Also, *Prieto v. Quarterman,* 456 F.3d 511 (C.A.5 Tex. 2006) (We remain ever mindful that "[w]e must be cautious not to apply the statute of limitations too harshly."). Equitable tolling must be considered for it is applicable law as to the statute of limitations issue, and this might appropriately require an evidentiary hearing. *Fleming v. Evans,* --- F.3d --, 2007 WL 970163 (C.A.10 Okla. 2007) (In vacating and remanding, the court of appeals held that an evidentiary hearing was warranted to determine whether one-year limitations period for filing habeas petition should have been equitably tolled.) Nothing in the Order of dismissal, or anywhere in the Record of the present case, indicates that Virginia's tolling provision applicable to statute of limitations was ever considered.

These considerations and analysis are not just procedural with insignificant consequences for their violation. They carry substantive importance to an issue that can deny a plaintiff its day in court by making a record of the facts that led to, and as to which the district court relied on, for its action. *See e.g.,* dissent in *Botten v. Shorma,* 440 F.3d 979 (C.A.8 Minn. 2006) (In its search for an applicable statute of limitations the court relied on the wrong contract.); and *Greene v. U.S.,* 440 F.3d 1304 (C.A. Fed. 2006) where on appeal from the Court of Federal Claims (CFC), the appeals court reversed the lower court's dismissal of Greene's complaint holding that the lower court had misconstrued the statute of limitations. *(Greene v. United States,* 191 F.3d 1341 (Fed. Cir. 1999) ("Greene II")).

The fact finding that is wholly absent in the present case includes a statement as to what statute of limitations is to apply as to each cause of action asserted; what is the start time that the statute is to start running, and whether this varies among conduct of the various 63 defendants; and when does that statute of limitations end as the deadline for filing a case

alleged a particular cause of action; and does the statute's tolling apply to any cause of action asserted and as to any defendant, and if so in what manner? This fact finding analysis is an essential step before proceeding to the next step of applying the facts in the type analysis required for reading a properly reasoned decision based on a record that can be reviewed as to its fact findings; for example, the type analysis as stated in *Bernard v. School Bd. of City of Norfolk, supra.*

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY CONSIDERING OTHER MATTERS RAISED ONLY AS ARGUMENT BY OPPOSING COUNSEL, WITHOUT ANY DISCOVERY, AND WHICH WERE NOT BEFORE THE COURT IN THE PRESENT CASE, AND IMPOSING SANCTIONS UNDER RULE 11 BASED ON THESE MATTERS, BEING BOTH EXTRANEOUS AND NOT SUPPORTED BY ANY EVIDENCE OF RECORD.

The district court's action in assessing any Rule 11 sanctions violates the substantive and procedural standards applicable under Rule 11 and creates a drastic conflict with other Circuits in their application of the *procedural and substantive standards applicable under the Rule 11 statute.*

The Record of this case is void of any properly established evidence to support the imposition of any sanctions under Rule 11. No discovery had been conducted. The only signed pleading filed by plaintiffs was the Complaint in each case, the facts of which are taken as a matter of law as true at the stage of the initial hearing in the case when the district court took this drastic action. Rule 11 sanctions are required to be based on a signed pleading. The June 2006 order is clear in that the

district court acted in this manner based on other matters, raised by way of argument, that were not before the Court in this case, and were not established as evidence through Discovery which provides the right of cross-examination to challenge the accuracy of arguments earlier made by a party's attorney.

The amount of the Rule 11 sanctions violates both the substantive and procedural standards applicable under Rule 11, one of which is a party's ability to pay. The purpose of Rule 11 is not to impose a chilling factor on a party's right to raise issues before the court, and is not to drive a party into bankruptcy. The imposition of over a half million dollars in Rule 11 sanctions, for the "reasons" as conclusory made in the district court's order, on its face is improper under both the Fourth Circuit and other Circuits' application of Rule 11 law. To let this stand would establish an unprecedented precedent that would wreck havoc with the standardization of Rule 11 has it has been adopted by all the Circuits. Its application on the Record of this case is unsupported, unprecedented and must be reversed.

III. WHERE NEW MATTER IS IMPROPERLY ADDED TO THE RECORD AT THE APPELLATE LEVEL, THE CASE MUST BE REVERSED AND REMANDED.

The case should have been denied under Rule 59 as not timely filed if that finding had been made by the district court, which it didn't make. The district court was silent on its reason for denying the motion.

It is error that the court of appeals injected new matter by assuming, or "finding", that the motion for relief was denied under Rule 60 where the district court's order does not state

that. This severely prejudices a party because it otherwise has a full year to file for relief under Rule 60 and it would make no sense for a party to rush in with an abbreviated motion for relief prompted by the good and noble intent to quickly bring the matter before the court, when if it were to be brought under Rule 60, a party could wait, and prepare a motion that addresses all the various grounds for relief available under Rule 60 and file it within one year after the order.

IV. THE FACTS AND PROCEDURES IN THIS IMPOSITION OF RULE 11 SANCTIONS CONFLICT WITH ESTABLISHED CASE LAW UNDER RULE 11 IN THIS AND OTHER CIRCUITS AND DRASTICALLY AND DANGEROUSLY VIOLATE THE LETTER AND CASE LAW OF RULE 11; IT WAS REVERSIBLE ERROR TO IMPOSE ANY RULE 11 SANCTION, AND ERROR TO IMPOSE THE AMOUNT OF OVER HALF A MILLION DOLLARS; AND THIS ACTION CREATES A SHARP CONFLICT WITH CASE LAW IN OTHER CIRCUITS.

The Order appealed from (USDC June 7, 2006) held that "plaintiffs are hereby ordered to pay sanctions in this action in the amount of $10,000.00 per named defendant." (Order, pg. 3, end of para. 1). With approximately 63 defendants, this totals $630,000. Neither the total amount of the sanctions, nor the names of defendants to which it is to apply, were set out in the Order. The USDC further stated as the reason for imposing this bankruptcy-loaded sanction amount that "it being apparent that no previous sanctions have impressed upon the plaintiffs to (sic) the gravity of their misconduct in these matters" (Order, pg. 3, para. 1). The "misconduct" referenced is not defined in this reason given for the Rule 11 action, although it obviously is based on matters not before the

district court, but rather is based on argument of defense counsel without being established in an evidentiary record through Discovery.

Rule 11 (Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A.) requires that any action thereunder must be based on a signed pleading. There is only one signed pleading in this case by plaintiffs, and that is the Complaint in each of the respective cases. Federal law, as with State law, is that statements made in a Complaint are assumed as a matter of law as true for purposes of any summary action prior to Discovery. The District Court's Order never faults the Complaints, and not any of the causes of action set forth therein. Thus the imposition of Rule 11 sanctions is without the required condition precedent of an improperly signed pleading and must be vacated.

Furthermore, Rule 11 sanctions are properly vacated where a party has advocated a plausible legal theory and the law is arguably unclear. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791 (C.A.5 Tex. 1993) (holding further that misapplication of Rule 11 can chill counsel's "enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories," contrary to the intent of its framers). *See also, Wasko v. Moore,* 172 Fed. Appx. 791 (C.A.10 N.M.2006) (Tenth Circuit reversed Rule 11 sanctions, holding that its imposition on an opposing party alleging a frivolous appeal was not warranted). *Also, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (U.S. Dist. Col. 1990) (Rule 11 does not authorize an award of attorney's fee).

It is clear from the June 2006 Order that the USDC based its Rule 11 action of matters not before the District Court, (June 2006 Order, pg. 2, second full paragraph), and are defense allegations raised as argument by defendant counsel.

Based on this, the USDC made its summary conclusion (Order *id.*, pg. 2, conclusory statements in first full paragraph) as to plaintiffs' intent in filing their most-serious Complaints for wrongful death of Mrs. Morrissey and related causes of action. As to these matters that were not before the District Court, the accuracy thereof was not established and plaintiffs dispute the correctness of such statements, accepted by the district court without being introduced as evidence through any properly adduced Discovery.

Rule 11 sanctions are vacated where materials not before the district court may have played a role in the prior decision to impose sanctions. *Greenberg v. Hilton Intern. Co.,* 875 F.2d 39 (C.A.2 1989).

The Eleventh Circuit in *Williams v. Weiss,* 190 Fed. Appx. 944 (C.A.11 Fla. 2006), ruled that the magistrate judge had issued an order granting Rule 11 sanctions against Williams, but failed to explain its reasons for doing so. It subsequently issued a report and recommendation that calculated the amount to be paid and the reasons for that amount, but again failed to explain why it ordered sanctions in the first place. The district court adopted the magistrate's report without further explanation. The Eleventh Circuit reversed, holding that, as a result, it has no record for review to determine whether the district court abused its discretion in awarding Rule 11 sanctions, and accordingly, it vacated the order granting Rule 11 sanctions and remanded the case in accordance with its opinion. *Also, INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F.2d 391 (C.A.6 Mich.1987) (where Rule 11 sanction award was remanded, due to the amount of sanctions not being calculated as to how the amount was arrived at, and was not broken down into component parts as to the three motions at issue in that case).

Therefore, the USDC action in imposing any sanction under Rule 11 is unsupported where the Complaints are the only signed pleading plaintiffs filed, and no reasoned decision exists finding those Complaints as improper. The amount is unsupported where, *inter alia,* it was clearly based, per the language of the order, on matters not before the Court and not produced as evidence through Discovery. This action if left standing presents stark contrast, and accordingly creates dangerous conflicts, with clear case law of other Circuits, such as the exemplary cases from the Second, Fifth, Sixth, Tenth, Eleventh and D.C. Circuits presented here.

V. THE JUDGMENT IS VOID *AB INITIO* FOR WANT OF PERSONAL JURISDICTION BASED ON THE USDC'S EXPLICIT FINDING THAT NO DEFENDANT WAS SERVED WITH PROCESS.

To Allow the Order, Entered Nonetheless as to Other Matters, to Stand, Creates Both a Sharp Conflict between Other Circuits and Is Not in *Compliance with This Court's Own Mandates.*

The lower court found that the plaintiffs failed "to timely serve the defendants". Order June 7, 2006, pg. 1, 2nd paragraph. This finding was made as to all defendants in all cases before the Court, i.e. that no defendant was properly served with process. The validity of a court order depends on the court having jurisdiction over the parties. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701,102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Without personal jurisdiction "the court is powerless to proceed to an adjudication." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584 (1999). Personal jurisdiction must be analyzed and established over each defendant independently. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985).

A judgment is void if there was no personal jurisdiction over a party. *U.S. v. Krilich,* 152 F. Supp. 2d 983 (N.D. Ill. 2001) (also holding: Rule 60(b)(4) provides that a void judgment is to be vacated). Lack of jurisdiction is embodied in Rule 60(b)(4) as a basis for relief from judgment. *Jackson v. FIE Corp.,* 302 F.3d 515 (C.A.5 La. 2002) (Court of Appeals remanded back to the USDC on lack of personal jurisdiction being properly challenged).

Further to this error and conflicts between the Circuits that it creates, plaintiffs, unlike defendants, did not receive benefit of seeing the draft order before it was entered. The Order states, "Signatures waived by agreement of counsel." Order of June 7, 2006, pg. 4. This is not true and prejudicial error. Plaintiffs did not waive signature, as supported by the Record which reflects no waiver of signature by plaintiffs. Thus while defendants were given advance notice of the order as drafted, which defense counsel drafted as handwritten corrections were made at page 3 thereof presumably by the Court, plaintiffs were denied that same advance notice for comment.

CONCLUSION

The actions of the district court and of the court of appeals, including the two orders of the district court (App. C, p. 12a, and App. B, p. 10a) and the Opinion of the court of appeals (App. A, p. 1a), are in violation of well established substantive and procedural rules of law. This violation severely prejudiced plaintiffs' right to have their day in court with appropriate Discovery so, for the first time ever, a properly produced evidentiary record can be established.

1.) The shorthand statute of limitations dismissal of one sentence without any analysis and without evidence;

2.) The similar short shrift given to imposing well over half a million dollars in Rule 11 sanctions against each plaintiff, again without any evidence of record and without applying any of the list of Rule 11 safeguards and standards, and with no finding of any improperly signed pleadings;

3.) And the procedural mess of a case where the venue rules were ignored and the case order in the end is unknown as to what case dockets and what defendants are implicated by it, and with a New York State judge ending up hearing the case in an Alexandria, Va., location that was a strange venue to everyone as no one sought venue there, it is not the resident situs of anyone, and the case was not filed there;--

The composite rulings and the ultimate rulings of the District Court 's Order being petitioned create sharp conflicts with other jurisdictions, as well as with the Fourth Circuit itself. This is a dangerous precedent on these issues to let stand and would wreck havoc with well established and adhered to laws and procedures of our judicial system. The Opinion and Orders below are wrong, stand in stark contrast to case law in other Circuits, deprive plaintiffs of basic and important rights, and should be reversed.

Respectfully submitted,

ESTATE OF DOROTHY L. MORRISSEY
by: Michael J. Morrissey, Its Administrator
and
MICHAEL J. MORRISSEY,

Petitioners.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed January 9, 2007]

No. 06-1828

MICHAEL J. MORRISSEY; THE ESTATE OF DOROTHY L. MORRISSEY BY: MICHAEL J. MORRISSEY, Its Administrator,
Plaintiffs - Appellants,

versus

ROBERT LESNIAK; ASHLAND CONVALESCENT CENTER; GEORGE F. TIDEY; HANOVER COUNTY ADULT PROTECTIVE SERVICES; HANOVER COUNTY; UNKNOWN STAFF MEMBERS; ADMINISTRATOR, Ashland Convalescent Center; PATRICIA GERSHENOFF; SALLY MOON; GEORGE ELMORE; JOSEPH RAPASARDO; HENRICO COUNTY; L.A. HARRIS; BON SECOURS, INCORPORATED, t/a St. Mary's Hospital; CARRIE WEST; TERRY BETINO; JEAN TODD; ELIZABETH OXENHAM; S.J. SEIDLITZ; C.A. WOOD; SHERYL L. HERNDON; ANN HONEYCUTT; HOWARD C. VICK; MICHAEL ROBERTSON; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF AGING; TERRY RAINEY;

VIRGINIA DEPARTMENT OF HEALTH; ANNE PETERSON; VIRGINIA CENTER FOR QUALITY HEALTH CARE; VIRGINIA DEPARTMENT OF MEDICAL ASSISTANCE SERVICES; HENRICO COUNTY DEPARTMENT OF SOCIAL SERVICES; HENRICO COUNTY DEPARTMENT OF MENTAL HEALTH; MARTHA CALLOWAY; RICHARD GLOVER; CYNTHIA WOOD; JAMES L. GILMORE; HARRY CARRICO, Virginia Supreme Court Participating Member as of September 1997; RICHARD H. POFF, Virginia Supreme Court Participating Member as of September 1997; CAROLYN WHITE; CAPITOL AREA AGENCY ON AGING; SHAWN MAJETTE; PAUL IZZO; OFFICE OF THE ATTORNEY GENERAL; RICHARD ALDERMAN; JAMES MOORE; JOSEPH RAPPASADA; HEALTH OF VIRGINIA, INCORPORATED, t/a University Park Nursing Home; PATRICIA L. JONES; WILLIAM BIGGERS; C. BEATTY; VICTORIA GUTMAKER; SUSAN A. CLIFTON; MARY ANN PROFFITT; AL HARRIS; GREER JACKSON; L. NEIL STEVERSON; EDWIN BISCHOFF; R.R. BROOKS; REBECCA ANDREWS; MICHELLE GAVIN, a/k/a Assistant Student; GAYLE CLENDENIN; PETER BOLING; MEDICAL COLLEGE OF VIRGINIA; VIRGINIA COMMONWEALTH UNIVERSITY; UNKNOWN DOCTOR; MCV PHYSICIANS, a/k/a MCV Associated Physicians,

Defendants - Appellees.

REED SMITH LLP,

Movant.

No. 06-2016

MICHAEL J. MORRISSEY; THE ESTATE OF DOROTHY L. MORRISSEY BY: MICHAEL J. MORRISSEY, Its Administrator,
Plaintiffs - Appellants,

versus

ROBERT LESNIAK; ASHLAND CONVALESCENT CENTER; GEORGE F. TIDEY; HANOVER COUNTY ADULT PROTECTIVE SERVICES; HANOVER COUNTY; UNKNOWN STAFF MEMBERS; ADMINISTRATOR, Ashland Convalescent Center; PATRICIA GERSHENOFF; SALLY MOON; GEORGE ELMORE; JOSEPH RAPASARDO; HENRICO COUNTY; L.A. HARRIS; BON SECOURS, INCORPORATED, t/a St. Mary's Hospital; CARRIE WEST; TERRY BETINO; JEAN TODD; ELIZABETH OXENHAM; S.J. SEIDLITZ; C.A. WOOD; SHERYL L. HERNDON; ANN HONEYCUTT; HOWARD C. VICK; MICHAEL ROBERTSON; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF AGING; TERRY RAINEY; VIRGINIA DEPARTMENT OF HEALTH; ANNE PETERSON; VIRGINIA CENTER FOR QUALITY HEALTH CARE; VIRGINIA DEPARTMENT OF MEDICAL ASSISTANCE SERVICES; HENRICO COUNTY DEPARTMENT OF SOCIAL SERVICES; HENRICO COUNTY DEPARTMENT OF MENTAL HEALTH; MARTHA CALLOWAY; RICHARD GLOVER; CYNTHIA WOOD; JAMES L. GILMORE; HARRY CARRICO, Virginia Supreme Court Participating Member as of September 1997; RICHARD H. POFF, Virginia Supreme Court

Participating Member as of September 1997; CAROLYN WHITE; CAPITOL AREA AGENCY ON AGING; SHAWN MAJETTE; PAUL IZZO; OFFICE OF THE ATTORNEY GENERAL; RICHARD ALDERMAN; JAMES MOORE; JOSEPH RAPPASADA; HEALTH OF VIRGINIA, INCORPORATED, t/a University Park Nursing Home; PATRICIA L. JONES; WILLIAM BIGGERS; C. BEATTY; VICTORIA GUTMAKER; SUSAN A. CLIFTON; MARY ANN PROFFITT; AL HARRIS; GREER JACKSON; L. NEIL STEVERSON; EDWIN BISCHOFF; R.R. BROOKS; REBECCA ANDREWS; MICHELLE GAVIN, a/k/a Assistant Student; GAYLE CLENDENIN; PETER BOLING; MEDICAL COLLEGE OF VIRGINIA; VIRGINIA COMMONWEALTH UNIVERSITY; UNKNOWN DOCTOR; MCV PHYSICIANS, a/k/a MCV Associated Physicians,

Defendants - Appellees.

REED SMITH LLP,

Movant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Leonard D. Wexler, Senior District Judge, sitting by designation. (3: 06-cv-00034-LDW).

DISPOSITION

No. 06-1828 DISMISSED
No. 06-2016 AFFIRMED

COUNSEL: Michael J. Morrissey, Appellant, Pro se.

William Fisher Etherington, Leslie Ann Winneberger, BEALE, BALFOUR, DAVIDSON & ETHERINGTON, PC, Richmond, Virginia; Robert A. Dybing, THOMPSON & MCMULLAN, Richmond, Virginia; Paul Kugelman, Jr., OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Jeremy David Capps, David Patrick Corrigan, HARMAN, CLAYTON, CORRIGAN & WELLMAN, Richmond, Virginia; Rodney Kyle Adams, Darren Thomas Marting, LECLAIR RYAN, PC, Richmond, Virginia; Richard Samuel Samet, GOODMAN, ALLEN & FILETTI, Glen Allen, Virginia; Robert Jacques Kloeti, FLORANCE, GORDON & BROWN, Richmond, Virginia, for Appellees.

JUDGES: Before WILKINSON and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION PER CURIAM

In these consolidated appeals, Michael J. Morrissey and the Estate of Dorothy L. Morrissey seek to appeal the district court's orders dismissing their civil actions and denying their motion for reconsideration.

In No. 06-1828, we dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed. Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). This appeal period is

"mandatory and jurisdictional." *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 264, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229, 80 S. Ct. 282, 4 L. Ed. 2d 259 (1960)). The district court's order dismissing the civil actions was entered on the docket on June 7, 2006. The notice of appeal was filed on July 14, 2006. Because Morrissey failed to file a timely notice of appeal or obtain an extension or reopening of the appeal period, we dismiss the appeal in No. 06-1828.

In No. 06-2016, Morrissey appeals from the district court's order denying his motion for reconsideration. Because he filed the motion outside of the ten-day window required for a Fed. R. Civ. P. 59(e) motion, it is treated as a Fed. R. Civ. P. 60(b) motion. See In re Burnley, 988 F.2d 1, 2-3 (4th Cir. 1993). A motion for reconsideration under Rule 60(b) does not bring up for review the merits of the underlying substantive judgment, nor does it toll the period for filing an appeal of the underlying judgment. *Browder*, 434 U.S. at 263 n.7. This court reviews the denial of a motion for relief from judgment pursuant to Rule 60(b) for an abuse of discretion. *Heyman v. M.L. Mktg. Co.*, 116 F.3d 91, 94 (4th Cir. 1997). We have reviewed the record and conclude that the district court did not abuse its discretion in denying the motion for reconsideration, as Morrissey failed to demonstrate any grounds that would entitle him to relief pursuant to Rule 60(b). Accordingly, we affirm the district court's denial of the motion for reconsideration in No. 06-2016.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

No. 06-1828 DISMISSED
No. 06-2016 AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed January 9, 2007]

No. 06-1828

MICHAEL J. MORRISSEY; THE ESTATE OF DOROTHY L. MORRISSEY BY: MICHAEL J. MORRISSEY, Its Administrator,
Plaintiffs - Appellants,

versus

ROBERT LESNIAK; ASHLAND CONVALESCENT CENTER; GEORGE F. TIDEY; HANOVER COUNTY ADULT PROTECTIVE SERVICES; HANOVER COUNTY; UNKNOWN STAFF MEMBERS; ADMINISTRATOR, Ashland Convalescent Center; PATRICIA GERSHENOFF; SALLY MOON; GEORGE ELMORE; JOSEPH RAPASARDO; HENRICO COUNTY; L.A. HARRIS; BON SECOURS, INCORPORATED, t/a St. Mary's Hospital; CARRIE WEST; TERRY BETINO; JEAN TODD; ELIZABETH OXENHAM; S.J. SEIDLITZ; C.A. WOOD; SHERYL L. HERNDON; ANN HONEYCUTT; HOWARD C. VICK; MICHAEL ROBERTSON; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF AGING; TERRY RAINEY; VIRGINIA DEPARTMENT OF HEALTH; ANNE PETERSON; VIRGINIA CENTER FOR QUALITY HEALTH CARE; VIRGINIA DEPARTMENT OF MEDICAL ASSISTANCE SERVICES; HENRICO COUNTY DEPARTMENT OF SOCIAL SERVICES;

HENRICO COUNTY DEPARTMENT OF MENTAL HEALTH; MARTHA CALLOWAY; RICHARD GLOVER; CYNTHIA WOOD; JAMES L. GILMORE; HARRY CARRICO, Virginia Supreme Court Participating Member as of September 1997; RICHARD H. POFF, Virginia Supreme Court Participating Member as of September 1997; CAROLYN WHITE; CAPITOL AREA AGENCY ON AGING; SHAWN MAJETTE; PAUL IZZO; OFFICE OF THE ATTORNEY GENERAL; RICHARD ALDERMAN; JAMES MOORE; JOSEPH RAPPASADA; HEALTH OF VIRGINIA, INCORPORATED, t/a University Park Nursing Home; PATRICIA L. JONES; WILLIAM BIGGERS; C. BEATTY; VICTORIA GUTMAKER; SUSAN A. CLIFTON; MARY ANN PROFFITT; AL HARRIS; GREER JACKSON; L. NEIL STEVERSON; EDWIN BISCHOFF; R.R. BROOKS; REBECCA ANDREWS; MICHELLE GAVIN, a/k/a Assistant Student; GAYLE CLENDENIN; PETER BOLING; MEDICAL COLLEGE OF VIRGINIA; VIRGINIA COMMONWEALTH UNIVERSITY; UNKNOWN DOCTOR; MCV PHYSICIANS, a/k/a MCV Associated Physicians,

Defendants - Appellees.

REED SMITH LLP,

Movant.

Appeal from the United States District Court for the Eastern District of Virginia at Richmond

JUDGMENT

In accordance with the written opinion of this Court filed this day, the Court dismisses the appeal.

A certified copy of the judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate

/s/_____
Patricia S. Connor
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case No. 3:06-cv034

[Filed August 15, 2006]

The Estate of Dorothy L. Morrissey	)
By: Michael J. Morrissey, Its	)
Administrator, *et al.*	)
Plaintiff,	)
	)
v.	)
	)
Robert Lesniak, *et al.*,	)
Defendants.	)
	)

ORDER

Upon the plaintiff's Motion to Stay, Vacate and Reinstate, and upon the appearance arguments of counsel and Michael J. Morrissey, personally and for the Estate of Dorothy L. Morrissey, the Court hereby ORDERS that the Motions are OVERRULED and denies the relief sought in Plaintiff's Motion.

The Clerk is ORDERED to mail authenticated copies of the order to all counsel of record and unrepresented parties.

ENTER: 8/15/06

/s/_____

Hon. Leonard D. Wexler USDJ

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case No. 3:06-cv034

[Filed June 7, 2006]

The Estate of Dorothy L. Morrissey By: Michael J. Morrissey, Its Administrator, *et al.* Plaintiff,	)
v.	)
Robert Lesniak, *et al.*, Defendants.	)

ORDER

Pursuant to the Order of the Court dated May 2, 2006, whereupon a hearing was set on the various Motion of the defendants, including dispositive motions, motions for sanctions, and motions to deem said motions unopposed, and

Whereupon the Court finding that the plaintiff, Michael J. Morrissey, and the Estate of Dorothy L. Morrissey by Michael J. Morrissey ("Plaintiffs"), having failed to file responses to said dispositive motions, and further having failed to have filed the actions consolidated under this case

number ('the cases") within the appropriate statute of limitations, having failed to timely serve the defendants, having failed to comply with the Order of the United States District Court, Eastern District of Virginia, Norfolk Division, regarding the filings of proofs of service on or before November 30, 2005, and having been properly notified of said hearing by mailing of a copy of the May 2, 2005 Order from counsel as well as from the Clerk's Office of the United States District Court, Eastern District of Virginia, Arlington Division, and further having failed to appear to make argument on any of the above, the Court finds it proper to dismiss with prejudice the cases.

Furthermore, upon the motions for sanctions previously filed and accompanied by memoranda of law, the Court finds that the conduct of the plaintiffs in this matter is egregious, vexatious and designed merely for the purpose of harassing and causing expense and inconvenience to the various defendants.

Furthermore, it is apparent to the Court that these matters have been dispositively resolved adversely to the plaintiff in a number of sister and state jurisdictions, including the Western District of Virginia, Richmond Division, the Circuit Court for the City of Richmond, the Circuit Court for the County of Henrico, the Circuit Court for the County of Hanover, as well as the Virginia Supreme Court.

Furthermore, upon the arguments of counsel as well as the briefs filed, it is apparent that the plaintiff owes tens of thousands of dollars in unpaid sanctions, none of which have proven effective deterrents against frivolously filing additional actions under the same set of facts. Additionally, the Court has found that these plaintiffs have been barred from filing additional claims against these defendants in a number of Courts, a bar which the plaintiffs have flouted time and again.

Wherefore, this Court rules as follows:

1. That the cases consolidated as 3:06cv034 are hereby dismissed with prejudice. Furthermore, with regard to the claims raised in those actions and the defendants against whom they are brought, plaintiffs are barred from bringing any further actions in any United States District Court for any state of territory of the United States absent prior consent following a personal appearance this Court or a sister Court of this District and Division, Furthermore, the plaintiffs must provide any court he petitions for leave to file with a copy of this order and of the complaints filed in this matter. Plaintiff's must then show cause why said actions may be properly brought, why they are not barred by the statute of limitations and why they are not barred by res judicata or collateral estoppel. Finally, it being apparent that no previous sanctions have impressed upon the plaintiffs to the gravity of their misconduct in these matters, the plaintiffs are hereby ORDERED to pay all previous sanctions awards, in addition to sanctions in this action in the amount of $10,000 per named defendant.

The Court will treat any violation of any provision of this Order as contempt of Court and will apply the appropriate sanction against the plaintiff, including but not limited to, incarceration for a period of time commensurate with the level of the violation.

By Order of this Court, this matter is hereby dismissed, and the endorsement of counsel are hereby waived. Counsel for the defendants are further instructed to confirm receipt of this Order by the plaintiffs either by service of process or by certified mailing. There being no further matters in these cases, the Clerk is ORDERED to strict the action from the docket and to mail authenticated copies of the order to all counsel of record.

ENTER: 5/30/06

/s/_____
Hon. Leonard D. Wexler USDJ

Signatures waived by agreement of counsel.

Michael J. Morrissey
2762 Granada Place
Lawrenceville, GA 30044

Michael Morrisey
2112 Oakwood Lane
Richmond, VA 23228

APPENDIX D

06-1828

Estate of Morrissey, et al. v. Lesmark, et al.
Appellants (plaintiffs') Supplemental Brief

[Filed October 27, 2006]

INFORMATION IN APPELLANTS' *CORRECTED SUPPLEMENTAL BRIEF,* ACCORDING TO THE INFORMAL BRIEF FORMAT

Plaintiffs' submit this as their *Corrected Supplemental Brief* on the appeal of the district court's denial of plaintiffs' Motion for Relief from Judgment, as directed by the Court's informal briefing scheduling order. The appellate consolidate this with the appeal of the underlying case. App. A. Whereas the appeal of a denial of a Motion for Relief brings into question the correctness of the initial dismissal order (citations infra), plaintiffs have incorporated by reference their *Initial Informal Brief* herein. Relief Order Denial, App.B.

> [Some facts and arguments apply equally or relate to more than one issue. Thus while plaintiffs have of course listed the issues and arguments separately, they are not intended to be confined or limited to only that issue where relevant on other issues. For this reason, plaintiffs incorporate by reference all facts and argument to all issues so to avoid any strict construction of supporting facts and argument from being equally available where relevant in support of other issues.]

1. A. U.S. District Court for the Eastern District of Virginia

   B. Order was entered by the Clerk on 8/15/06.

2. Not applicable (for prisoners only).

3. Issues on Appeal

Overview of Issues Raised

The following is a summary list of issues raised in this appeal made in the format of the outline of the brief listing the issues raised and arguments presented herein:

PREFACE AND BACKGROUND

ISSUES AND ARGUMENT

STANDARDS OF REVIEW
For R59
For errors of law
For orders terminating a case

I THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFFS' RULE 59 MOTION

A. The Notice Given For The Hearing On Appellants' Motion For Relief From Judgment Was Both Untimely And Insufficient And Is Reversible Error As To The Action Taken At That Hearing Held Without Proper Notice

B. The District Court's Order For Dismissal Was Clearly Erroneous, And Denial Of The Properly Based Motion For Relief Was Further Error And Should Be Vacated On Appeal To Prevent Manifest Unjustice

C. A Lack Of Personal Jurisdiction Existed Over The Defendants In View Of The District Court's Finding That None Of The Defendants Were Properly Served, And Defendants Had Entered Only A Limited "Special Appearance". It Was Error For The District Court To Act Further In Disregard Of This Lack Of Jurisdiction And Limited Appearance And Further Error In Not Correcting This Error On Plaintiffs' Motion For Relief

D. Dismissal With Prejudice Was A Further Abuse Of Discretion By The Trial Court

E. The District Court's Order For Rule 11 Sanctions Was Clearly Erroneous And Manifestly Unjust And Denial Of The Motion For Relief Is Reversible Error Of Law In View Of The Violation Of Rule 11 Standards

(1) The District Court Failed to Satisfy Rule 11's Substantive Requirements *And* No Specific Findings Or Rationale Are Set Forth By The District Court To Support Its Summary Issuance Of Rule 11 Sanctions.

Presumptions By A Trial Court Do Not Support Action Under Rule 11

Failure To Apply The Requirements of Rule 11 Requires Reversal

Rule 11 Requires Specific Findings Be Made As A Condition Precedent To Assessment of Sanctions

Regarding Imp roper Use of Rule 11 to Enjoin Future Conduct

The Calls for Restraint as to Overuse of Rule 11

(2) The District Court Failed To Satisfy Rule 11's Procedural Requirements *And* No Specific Findings Or Rationale Are Set Forth By The District Court To Support Its Summary Issuance Of Rule 11 Sanctions.

(3) The Staggering And Unsupported Amount Of The Rule 11 Sanction Is Evidence Of An Extreme Abuse Of Discretion

Excessive Rule 11 sanctions

II. THE INITIAL ORDER ENTERED BY THE DISTRICT COURT DID NOT RESOLVE ALL ISSUES AS TO ALL DEFENDANTS AND THUS WAS NOT A FINAL ORDER

A. The District Court Failed To Rule On The Declaratory Judgment Sought By Appellants And Thus The Order Entered Did Not Resolve All Issues And Was Not A "Final Order"

B. The District Court Failed To Rule As To Defendants Named In The Cases As Filed That Did Not Participate In The Case And Thus The Order Entered Did Not Resolve All Issues As To All Defendants And Was Not A "Final Order"

III. THE DISTRICT COURT ERRED IN STATING THAT APPELLANTS HAD WAIVED SIGNATURE AND ENDORSEMENT OF THE DRAFT ORDER OF DISMISSAL AND SANCTIONS, THUS EXCLUDING APPELLANTS OF THIS RIGHT AS TO A MOST CRITICAL ENTRY, WHILE ACCORDING THAT RIGHT OF NOTICE PRIOR TO ENTRY TO DEFENDANTS

IV. THE ASSIGNMENT OF THE CASE TO A JUDGE FROM NEW YORK WAS IMPROPER AND ERROR

V. THE DISTRICT COURT ERRED BY FAILING TO MAKE FINDINGS OF FACT IN FINDING THAT ALL PLAINTIFFS' CLAIMS AS TO ALL DEFENDANTS ARE BARRED BY THE STATUTE OF LIMITATIONS, ASSUMING *ARGUENDO*, BUT NOT KNOWING SINCE IT IS NOT SPECIFIED IN THE ORDER, THIS BEING THE BASIS OF THE DISMISSAL

VI. Virginia Law As To Venue Will Be Applied Where It Is Not Preempted By A Federal Statute.

Issues Presented

From the above outline, the issues presented are summarized as follows:

Whether The District Court Abused Its Discretion In Denying The Plaintiffs' Rule 59 Motion

Whether Proper Notice Was Given For The Hearing On Appellants' Motion For Relief From Judgment

Whether A Lack Of Personal Jurisdiction Existed Over The Defendants In View Of The District Court's Finding That None Of The Defendants Were Properly Served, And Defendants Had Entered Only A Limited "Special Appearance".

Whether The District Court Erred In Dismissing The Case, And In Dismissing The Case With Prejudice.

Whether The District Court's Order For Rule 11 Sanctions, And the Magnitude of Santions Imposed, Were Supported Under the Substantive and Procedural Standards Applicable Under Rule 11.

Whether The Initial Dismissal Order Failed to Resolve All Issues Before the District Court Making It Not A Final Order

Whether The District Court Erred In Stating That Appellants Had Waived Signature And Endorsement Of The Draft Order Of Dismissal And Sanctions, And Thereby Wrongly Excluding Plaintiffs, But Not Defendants, Of Their Right Of Endorsement Of The Draft Order Before Its Entry.

Whether The District Court Erred In Transferring Venue In The Case To The USDC In Alexandria, Virginia Rather Than In The Proper Venue Of The USDC Norfolk Where It Was Filed.

Whether The District Court Erred In Assigned This Complex, Virginia Case Involving Matters Of Virginia Substantive Law To A Foreign Judge From New York State.

Whether The District Court Erred By Failing To Make Required Findings Of Fact, Including Fact Findings As to Statute Of Limitations, Reason for Dismissal, Reason for Dismissal With Prejudice, and Fact Findings Required Under Rule 11 As To The Basis For Both The Assessment Of Sanctions And The Amount Of Sanctions Imposed.

Whether The District Court Abused Its Discretion By Not Correcting The Errors Presented Herein, And Those Presented In Plaintiffs' Initial Informal Brief, On Plaintiffs' Motion For Relief From Judgment.

Whether The District Court Erred In Failing To Address At

All The Separate Case Filed On Or About Dec 7, 2005, In Acting Prematurely And Without Notice In Transferring Venue Of That Case To The USDC Richmond, And In Failing To Enter Any Ruling (Neither Findings Of Fact Nor Conclusions Of Law) As To That Case In Its Order, And Accordingly Whether The Order Entered And Subject Of This Appeal, In Not Resolving The Issues Of This Case, Is Not A Final Order Subject To Appeal But Rather Is An Interlocutory Order With Matters Of This Dec 7, 2005 Case Being Still Outstanding And Pending.

[This Issue Of The Order Not Being A Final Appealable Order Is Also Raised In The Related Issues, Separately Presented, Of The Order Not Ruling As To The Declaratory Judgment Sought And Not Ruling As To All Defendants Listed In All Complaints Filed In The First Cases Filed In May 2005].

Having given the above brief outline and summary of issues presented, plaintiffs proceed in the following to present these issues and their facts and arguments.

PREFACE AND BACKGROUND

Quite timely, the Saturday evening news just on October 14, 2006 featured a segment on "The Growing Problem of Elder Abuse in the U.S." The usual suspects are friends and strangers that prey on the needs and helplessness to deplete the finances and life out of that group of Americans loosely referred to as the "elderly", but more accurately known as anyone who is defenseless or too innocently trusting. While State Legislatures pass more and more statutes and criminal penalties to ward off such predators, the criminal activity designed to enrich the big, deep pockets of others continues escalating to catastrophic numbers, with over 500,000 such activities reported last year and multiples of that number going

un-reported. It is that hidden, unreported activity of two prime targets of this abuse that plaintiffs tried in vain to report, and get court and other intercession to stop, for over a long three-year period.

Nursing homes have long been a source of abuse of those unable to defend themselves. The activity known as "guardianship", while an admirable and needed tool for help when used ethically and competently, becomes treading legally on thin ice when used by bureaucrats as a vehicle for dumping the defenseless into a holding cell for slow death loosely called a "nursing home" with little nursing done and it certainly is not "home" (German translation being, "broken hospital"). When the two collide, guardians using nursing homes as dumping grounds, the result is irreparable catastrophe, family destruction and permanent heartbreak.

The reckless use of Guardianship has been severely attacked by numerous legal entities, including reports of the American Bar Association and the courts as both dangerous in a legal sense in that all a person's rights are terminated by control of the person turned over to another, too often a complete stranger, and in the humane sense in that the usual result is a severance of the family, i.e. those who really know and love the person, followed by isolation, despair, bedsores for forced imprisonment on a mattress, and death.

This secretive and inhumane brutality is often the kind that festers behind closed doors, hidden in conduct known only to the so-called guardian and blocked from daylight by the locked doors of suspect institutions in which the victims are trapped with less rights that the worst felons in prison. After financial depletion, the confinement often ends only with either deliberate death or by a knowing and planned death prompted by a wanton and willful disregard for human life, something too that silences the main witness against those

white-collar abusers. The predatory abuser group is, therefore, are too often not the friends and strangers off the street, but rather are the guardians, the nursing home key personnel, their vendors, the government agencies that look the other way, all who are able to pick away at the financial resources of the person and take at will, and yes, certain judicial officers who recklessly give out guardianships to their friends as easy money and fail to honor the Code in Virginia that mandates safeguard hearings that are never held. As the U.S. District Court, West Va. said, "It guardianship cases, it is the judge who is and remains the ultimate guardian." USDC, W. Va. ____.

Once all the person's rights to life, liberty and their pursuit of happiness are taken away, and many times in their absence without any court appearance (as here), the person is then rendered helpless, not due to their own inability at all, but due to the misuse of the process with knowledge of such grave Constitutional and human rights violations that trap the person to their quick death.

This is exactly what happened to Dorothy Morrissey, except it was not a quick death. It was three years of torture, brutality evidenced by blood and bruises in photos (not yet made public since no Discovery), and the cruelest isolation and severance of this family's sacred family bond. This epidemic is more regularly being exposed now as the baby boomers age, and their parents live longer. It is due to this rampart exploitation by individuals who after orchestrating for greed this white-collar criminal activity, go through histrionics and pretend outrage at the very thought of them being sued. This is the background that gives rise to the case, actually eight cases separately filed for manageability as to time frames, which seeks accountability for the conduct underlying plaintiffs' claims.

The defensive recourse the court often faces is, as done here, to launch personal attacks on the plaintiffs personally, and the record of this case is filled with that as an attempted distraction from the allegations and the facts of this case....not that of other cases, other events, and other mudslinging of any sort, none of which is properly before this Court. As the district court indicated in Reed v. Buckeye Fire Equipment Co., 422 F.Supp.2d 570 (W.D.N.C. 2006): --When accusations are made without any supporting evidence, the Court finds it difficult to refrain from immediately imposing Rule 11 sanctions against the accuser--.

Plaintiffs give this background because they see no need to engage in making responses and corrections to all the extraneous matter, snippets carefully selected out of context from other cases so one beings to wonder what case is actually before the district court, and personal attacks that defendants have generously woven into many, if not most all, papers filed. It is not relevant and the rebuttal would be too lengthy and necessarily would go off into other irrelevant matters that are not before this court. At the same time, given this sprinkled throughout certain filings, plaintiffs do not want this Court to assume that any such material is correct and without correction, hence the need for this statement. Indeed there is plenty of correction needed but can be addressed through the controls of proper Discovery for establishing an evidentiary record, something so far missing here.

Just by way of brief illustration, defendants do not, for example, mention a bit about the case that DID go to a jury trial, at which the jury not only award full damages as requested by plaintiff, but trebled the amount as added punitive damages. Defendants do not mention a bit about the judge who admonished one of the guardians for wrongfully trying to take, i.e. steal, plaintiffs' property, harshly ending the lambasting with, "You should know better". Defendants

do not mention a bit about the County police having to come out on their own to block the guardian from similar violations of Mrs. Morrissey.

This list could go on and on, but this case should focus on this case, and not on other untested, inaccurate, and piecemeal excerpts used without equal attention given to what was the full record or events surrounding such extraneous matters injected. Let proper Discovery be conducted so cross-examination can bring out the full and real facts; otherwise it is irrelevant and should be disregarded as argument absent properly produced evidence.

Plaintiffs turn now to address the consolidated case, and one threshold issue on appeal being the consolidation as error for it makes unmanageable such a huge case of multiple defendants each with multiple causes of action to decide. The adverse effect of this is present in the two orders themselves that are the subject of this appeal where conclusions are given without regard to any particular defendant or any particular cause of action. It is all done in one broad brush as though everything applies equally to all defendants and to all causes of action, and it does not. This is the damage and prejudice to plaintiffs of such a consolidation, one made here also in a conclusory manner without any reasoning leading to that conclusion.

Another issue addressed herein is the district court's order making slight reference to statute of limitations, but yet not connecting that as the basis for dismissal. Truth is, the case was filed well within the statute of limitation, contrary to the lower court's unsubstantiated finding to the contrary. By way of example, the case was filed well within the five year period for damage to property, for breach of written contracts, and for continuing and ongoing Medicaid and other financial fraud and wrongful takings and continuing attempts still being made

for future takings. Other S/L provisions also apply favorably for plaintiffs as to all causes of actions asserted. Since the order gives no reasoning behind this conclusion, and later dismisses the case without stating the grounds of the dismissal, it is difficult for plaintiffs to argue on appeal without speculation and making assumptions or guesses, which is improper to do. The above is given only by way of examples as to the S/L because it is mentioned. It is not meant to be an exhaustive rebuttal because the specific reasoning for the trial court's action, whose duty is to make findings of fact based on the evidentiary record (not on argument of counsel), is not stated.

Facts asserted in a Complaint are assumed for purposes of the sufficiency of the Complaint as true under the law. Merkle Press Inc. v. Merkle 519 F.Supp. 50. The nature of this case and the allegations present can hardly be said to be frivolous, and the district court did not find that it was. Rather the claims are the most serious in the civil arena since one party paid the ultimate price by being killed.

It is in the light of this Background and Preface that plaintiffs explain why much of the bulk of defendants' papers are not here responded to, although strong exception is taken to the appropriateness, relevance and correctness of such comments that comprise much of defendants' filings. Plaintiffs do not address all such arguments injected by defense counsel as it should not bear on the factual issues here and will ultimately be shown as largely irrelevant to the case before the district court but instead properly focused on the district court's action in view of the record and cited authorities presented herein.

Having noted their objections to such matter and urging this court to focus not on argument of counsel below but rather on evidence in the record (and there is none as there

has been no discovery or evidence properly produced), plaintiffs now proceed with addressing the issues raised in this appeal which, in summary, focus on issues going to the sufficiency and insufficiency of the two orders entered by the trial court that are the focal points of this appeal.

Plaintiffs incorporate herein by reference as though fully stated here its Informal Brief on Appeal previously filed, attached hereto as App. A. In addition, and/or supplemental to the issues and argument presented therein, plaintiffs state the following as to issues further raised on appeal, in addition to those previously presented.

ISSUES AND ARGUMENT

STANDARDS OF REVIEW

The Standard of Review for dismissal of a Motion for Relief from Judgment is based on an abuse of discretion.

The Standard of Review for errors of law is a *de novo* review.

The Standard of Review of any action of dismissal of a case is that of strict scrutiny of the dismissal, i.e. the highest Standard of Review given its terminal impact as to claims asserted.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFFS' RULE 59 MOTION

The Federal Rules of Civil Procedure embody the policy that form and technicalities should be disregarded in order that the rights of litigants may be decided upon the merits. *See, e.g., Holley Coal Co. v. Globe Indemnity Co.*, 186 F.2d 291 (4th Cir. 1951). The Fourth Circuit has long held that it is a principle of the utmost value that courts should decide cases

upon the merits, rather than upon technicalities. *See Liberty National Bank of Roanoke v. Bear*, 4 F.2d 240 (4th Cir.), *cert. denied*, 268 U.S. 693 (1925).

In the case at bar, the district court denied the Plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. P. 59. (It is noted that FRCP Rule 60 also gives a basis for relief, such as R60(b)(6) which provides for upholding the interests of justice with authority for granting relief for any "reason justifying relief from the operation of the judgment", although the district court did not address this.)

The court denied the Plaintiff's motion from the bench, without explanation or findings. Such explanation and findings cannot be gleaned from the court's earlier order dismissing this action and awarding sanctions against the Plaintiff, in that the previous order likewise contained truncated and conclusory findings and conclusions. The effect of the court's denial of the Plaintiff's Rule 59 motion was to decide the case on a basis other than the merits, in violation of the strong preference that cases be resolved on their merits, rather than upon technicalities. For these reasons, the district court's denial of the Plaintiff's motion for relief, including that as provided pursuant to Fed. R. Civ. P. 59, constituted an abuse of discretion, and should be reversed.

A. The Notice Given For The Hearing On Appellants' Motion For Relief From Judgment Was Both Untimely And Insufficient And Is Reversible Error As To The Action Taken At That Hearing Held Without Proper Notice

In the afternoon of Wednesday, August 15th, at about 2:00 o'clock p.m., a hand delivered "notice" was left at appellants' address. A copy of what was left was copied by the clerk for inclusion in the record of the case, which shows that it

consists of a short cover letter from an opposing counsel saying he was going to present the attached order at 10:00 a.m. tomorrow! The second page was a short draft prepared by this opposing counsel of an order to deny appellants' pending Motion for Relief from Judgment. There is no certificate of service showing service on any other parties, or of the papers being filed with the district court; no order from the Court setting any matter down for a hearing; and no prior contact, such as by telephone, had been made to appellants about this, despite the short "notice" and the improper form and content of the notice.

Appellants immediately drove to the clerk's office, U.S. District Court in Richmond, and inquired whether the case was scheduled for a hearing, since appellants had received no other notice about any hearing, other than this cryptic, last-minute paper from one of the defendants' counsel. The case manager at the clerk's office checked and assured appellants that the case was not set for hearing and it was not on the court's docket for tomorrow. Appellants showed the clerk the 2-page "notice" just hand-delivered to his mailbox. The clerk checked and reported she had no record of this and made a copy of it so she would have it in the case file.

Perplexed at this "notice" just delivered, appellants asked for confirmation and a supervisor assisted and again confirmed that no hearing was scheduled and there was no need for appellants to show up at Court tomorrow. Appellants started to leave but, still concerned, asked about contacting the judge's law clerk. Further inquiry took place by the clerks and they then found that, yes, it was scheduled for a hearing in the Alexandria, Va. USDC for tomorrow! Inquiry was then made as to the purpose of the hearing and no one seemed to know what it was set down for, since no order setting the hearing had been entered. Calls to the USDC Alexandria resulted in the best guess being that it was set for

a status hearing. Efforts to contact the judge were unsuccessful as the Richmond clerk's office was told that he was in transit from New York, where he was based, to Virginia, and his law clerk was with him, so no information could be obtained, other than it was set for a status hearing tomorrow morning.

So with less than 24-hours notice and no court scheduling order entered, appellants' appeared early at the USDC Alexandria to try to get more information prior to the hearing. The clerk's office at the USDC Alexandria had no information. About 5-10 minutes prior to the hearing, appellants were able to speak briefly with the judge's law clerk in chambers, and he said that it was set for a status hearing. The law clerk said that the judge would not be back in Virginia until November and "he likes to keep these moving" hence the status call. The law clerk then said "you have a motion to be heard and anything else". This was the first time that appellants were notified that the motion was to be heard, and this was raised with the law clerk about there being no notice on this. At that point, the judge was about to take the bench in court and the law clerk had to go.

Thus appellants now had a matter of minutes notice that the motion was to be heard, and hastily mentally prepared for this while sitting in the courtroom waiting for the case to be called.

At the hearing that subsequently followed, numerous matters were raised in support of the motion and argument received from both sides. Appellants asked for relief from the judgment as to both the dismissal and from the Rule 11 sanctions. Appellants explained that while some responses had been filed to appellees' defensive motions, unexpected medical problems that resulted in four surgeries in early 2006 had prevented appellants from responding to all of appellees'

filings, that appellants contested those filings as being without merit and unsupported by any evidence of record, since no discovery had been conducted and no evidence taken to establish a proper record. The trial judge was not aware of any of appellants' reply filings as evidenced by his question about whether replies had been filed. Mindful of the law clerk's statement that the judge wanted to move things along and would not be back until November, appellants suggested that Discovery could be conducted between now and then so there would be no delay and a proper record could be established to base any factual findings, thus correcting the present status of there being no evidentiary record.

The trial court summarily denied the motion with little comment and no substantive comment as to the reason(s) for the denial.

Based on these facts, (1) there was insufficient Notice both of this hearing itself and as to the purpose of the hearing, and this constitutes reversible error. (2) The court failed to make substantive findings concerning the reason for the dismissal, and this constitutes reversible error.

No excessive delay would have occurred in this case if the trial court had allowed for Discovery, or alternatively for a limited Discovery as to pending defensive motions, which would have established a proper record on which to base factual findings, something that does not exist in the case. This would have further the Court's often-stated policy of having cases heard on their merits. It was an abuse of discretion for the trial court not to allow this and is reversible error.

B. The District Court's Order For Dismissal Was Clearly Erroneous, And Denial Of The Properly Based Motion For Relief Was Further Error And Should Be Vacated

On Appeal To Prevent A Manifest Injustice.

A motion for relief from a judgment, or to alter, amend or reverse a judgment, is provided for under the Federal Rules of Civil Procedure (FRCP) Rule 59, and alternatively under Rule 60. The United States Court of Appeals for the Fourth Circuit has recognized three separate grounds for a court to grant Rule 59 relief: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir.1993).

The third prong of Rule 59 includes two separate grounds for granting a motion for relief from judgment: clear error or a manifest injustice. For example, the court may choose to ground its grant of a Rule 59 motion on clear error absent the possibility of manifest injustice. Mantle Ranches, Inc. v. U.S. Park Service, 950 F.Supp. 299 (D.Colo. 1997). The discretion under R59 is not without limit, and the court must strike the proper balance between the competing interests of finality of judgments and the need to render decisions on the basis of all the facts. Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir.1990), overruled on other grounds, Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir.1994).

Plaintiffs assert that the motion for relief was both appropriate and necessary and should not have been dealt with in such a summary manner, as is evident that it was from the order. The motion should have been granted to correct both a manifest injustice and to correct manifest errors of law or fact on which the district court judgment is based.

Plaintiffs in this matter specifically rely on the grounds of clearly erroneous judgment and potential for manifest injustice

as available under Rule 59 in support of their motion and are not alleging an intervening change in controlling law or newly-uncovered evidence. This appeal predictably raises factual matters heretofore unexamined and unlitigated after the summary dismissal of the entire Complaint and denial of the Motion for Relief from Judgment. The lower court's order erects a barrier that blocks even the most preliminary attempts at substantive investigation into the Plaintiff's cause of action, such as by blocking any Discovery to establish an evidentiary record, which does not exist. Plaintiff is asserting that the Court's Order of Dismissal in the main case was clear error. That order is brought back before the trial court in the Motion for Relief and subsequent Order Denying Relief on plaintiffs' motion which separately raises the issue of the correctness of the earlier Order of Dismissal. The Motion for Relief gave the trial court opportunity to re-visit and correct errors of the earlier Order. Under Federal Court Rules and case law for granting relief from a judgment, be it due to error in the judgment or violation of any of the other standards mandated by case law for considering and for granting the relief requested, the lower court's summary denial of the Motion for Relief, just as in the earlier Order of Dismissal, fails to provide a reasoned discussion of the issues and violates the Rule and standards enunciated under the Rule. The lower court's action was clearly erroneous and/or manifestly unjust. The arguments presented in this appeal thus serve to rebut the adverse action taken without explanation by the trial judge, and support plaintiffs' position that the Order Denying Relief cannot, consistent with case precedent of this and other Circuits, stand and should be reversed.

In Barton v. Sindall Transport, Inc. 934 F.2d 318 (C.A.4 Md. 1991), in an unpublished disposition, the court once again reviewed the denial of a motion to alter or amend a judgment pursuant to Rule 59 under the standard of abuse of discretion. (Boryan v. United States, 884 F.2d 767, 771 (4th Cir.1989)). "Although motions (under Rule 59) are often based

upon newly discovered evidence, such motions are also an appropriate method through which to challenge judgments based upon errors of law." *Cf.* Patterson v. Bowen, 839 F.2d 221, 224 (4th Cir.1988). "Fairly read, the district court's order was based on its conclusion that Barton had displayed a "lack of due diligence" in prosecuting his claim and was therefore not entitled to relief from the order dismissing his case."

The appeals court in Barton made no bones about the fact that it believed that the district court failed to give adequate consideration to the holding in Dove v. CODESCO, 569 F.2d 807 (4th Cir.1978) and reversed as an abuse of discretion a district court's order of dismissal in a similar situation.

Significant in Dove, this appellate court held that **the appeal of an order regarding Rule 59 motions brings both the Rule 59 order and the underlying order before the appeals court *and* that the inherent power of the district court to dismiss a case with prejudice on ground of delay on part of plaintiff is limited to situations in which there is clear evidence of deliberate delay on part of plaintiff**.

Bearing analogy to the present case, Dove, *supra*, involved notice of a pretrial scheduling conference that was sent by the Clerk of the Court for the District of Maryland. No attorney appeared on plaintiff's behalf and the district court ordered that the case be dismissed. On appeal, the court recognized the power of a district court to dismiss a case on the basis of plaintiff's dilatoriness in prosecuting it. Dove, at 810; see Link v. Wabash R.R. Co., 370 U.S. 626 (1962). However the Barton court emphasized that exercise of this power **must be limited to "situations in which there is clear evidence of deliberate delay on the part of the plaintiff**." Dove, *supra*, at 810. The court recognized that the record disclosed a number of minor defaults, but no evidence of deliberate delay by the plaintiff or his attorneys. *Supra* at 810

[emphasis supplied]. Plaintiff unfortunately here was undergoing medical surgeries on four separate occasions in the 3-4 month interval leading to the dismissal of the plaintiffs' case. Given that this plaintiff faced and was forced to deal with serious medical conditions just prior to the defendants' flurry of summary motions, this gravely impacted on plaintiffs' abilities at that moment, yet in no way constituted a deliberate or willful delay. The desire to still be around to pursue this forced that the medicals be dealt with at that particular window of time. Given the great expense and effort already put into this cause, plaintiffs were anxious to proceed with the litigation and had no reason to want to prolong the initial stages. Bottom line, there was no deliberate delay on the part of the plaintiffs as required by Dove. Further, the underlying orders themselves make no finding of any willful, deliberate delay by plaintiffs.

In the absence of such a finding, it is submitted that the district court abused its discretion in denying plaintiffs' motion for reconsideration. Note that in Barton, under circumstances ostensibly involving potential misconduct by counsel, the court nonetheless concluded that while we could "in no way excuse the failure of plaintiff's local counsel to familiarize herself with local rules and practice, we think that the sanction of dismissal was overly harsh and therefore an abuse of discretion."

In E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Systems, 116 F.3d 110, the trial court dismissed the notion that affidavits potentially constituting newly discovered evidence were a basis for granting the Rule 59 as newly discovered evidence since they did not rest their reasoning on the previously unavailability of this evidence (the second of the three possible grounds under R59). The previous court's order denying subpoena enforcement was instead, according to the appellate court, "based on an erroneous understanding of

the relevance" of the material requested, and thus, permitting the ruling to stand would result in "manifest injustice." (the third listed ground for granting relief under R59). On appeal, Lockheed challenged the district court's grant of the EEOC's Rule 59 motion and the court's decision on the merits granting enforcement of the subpoena. The court therefore was faced with the task of reviewing a previous order granting a Rule 59 motion under the abuse of discretion standard in Boryan v. United States, 884 F.2d 767, 771 (4th Cir.1989). Ultimately, the court based its decision to grant the motion for reconsideration on the third prong of the Hutchinson test permitting a court, in its discretion, to grant the Rule 59 motion "to correct a clear error of law or prevent manifest injustice." Hutchinson, 994 F.2d at 1081. It was held that the district court did not in any way abuse its discretion in granting the relief sought on that basis. Indeed the district court went further to enunciate that in view of the legal precedents before it, it would have been an abuse of discretion **not** to grant the motion. In sum, the district court's reasoning was upheld E.E.O.C., precisely in its granting of the Rule 59 relief requested to otherwise prevent what would be a manifest injustice and correcting an earlier contrary erroneous ruling that was narrowly drawn to an incorrect interpretation as to intent in the use of a particular document, in that case an affidavit. E.E.O.C. thus stands as another precedent for the motion on appeal herein. See also U.S. v. Arrington, 153 F.3d 722 (Table), 1998 WL 433302 (C.A.4 N.C.1998) (district court order vacated on appeal on denial of a R59 motion due to a clear error of law).

In the case of a district court's dismissal of the complaint, the court in Hensley v. Alcon Laboratories, Inc. 277 F.3d 535 (C.A.4 (W.Va.)) consented to review sanctions issued below for abuse of discretion where "the appropriate relief might again, on remand, become an issue". It noted that "...dismissal other than on the merits must be supported by a

finding of bad faith or other similar abuse." "Even then," the court continues, "because it is 'the most extreme sanction,' dismissal may not be entered without the court's first considering numerous factors, including the availability of other sanctions. (United States v. Shaffer Equip. Co., 11 F.3d 450, 462-63, enumerating six factors). The order appealed from herein considered none of these factors.

The court in Hensley then stated, "In this case, not only is the record devoid of the bad faith or abuse necessary to justify dismissal, see Chambers v. NASCO, Inc., 501 U.S. 32, 45-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), but the district court *also* failed to consider the six factors enumerated in Shaffer, *particularly* whether other less harsh but effective sanctions were available." Id. [emphasis supplied] "In this case, the court could have specifically enforced the settlement agreement or could have included its terms in a decree similar to a consent decree." The court accordingly concluded that, based on the record before it, the sanction of dismissal was clearly inappropriate, and reversed.

In U.S. v. Belcher 53 Fed.Appx. 308, 2002 WL 31875551 (C.A.4 Va. 2002) the court granted a certificate of appealability, vacated the district court's denial of plaintiff's Rule 59 motion for reconsideration, vacated the district court's dismissal of his § 2255 motion, **and** remanded the case to the district court for consideration of the § 2255 claims **on the merits**.

In view of the considerations taught by these precedents, the instant wrongful death suit implicates profound issues of life and death that cannot be ignored, including respect for the decedent's formally prepared advance medical directives and durable power of attorney, both wrongly disregarded at the outset of the underlying conduct on which the present case is based; and hearings held in the absence of these essential

parties, ending with total control handed over to strangers, termed "guardians". What followed was a piling on of those trying to enrich their own deep pockets at the expense of, and with inhumane disregard to, this family. The Complaints thus present the most serious issues that go to the roles of the municipality and law enforcement in the death of the decedent, involuntary institutionalization, false imprisonment, severance of the family bond, wrongful takings of property and breaches of multiple written contracts, all perpetrated over a three-year ordeal against plaintiffs, and against Mrs. Morrissey in particular who, up to the time she was deliberately killed, was a legally competent person, the same as you and me.

Further relevant is the case of Arnold v. Hoffe 142 Fed.Appx. 655, 2005 WL 698593 (C.A.4 W.Va.2005) where the lower court denied a motion for reconsideration of an order dismissing a federal habeas petition, based on the petitioner's failure to sufficiently prove he was subject to a term of probation at the time he filed the petition. On appeal and with a manifest injustice looming, this was deemed an abuse of discretion warranting remand for reconsideration of the motion in light of all the evidence.

In Arnold, given the mandate of the Court of Appeals on a prior appeal that the district court specifically consider and make findings on factors bearing on the motion, such as to (1) determine whether petitioner was "in custody" within the meaning of the habeas statute when he filed his petition, (2) the petitioner's persistent claims he had received a consecutive five-year suspended probationary sentence, and (3) the petitioner's attempts at submission of portions of a transcript which evidently comprised ***the only available evidence*** of his sentence, and (4) the district court's ***failure to obtain any response or a complete record from the state***. The court was even further required to take the serious weight of the legal

rights involved into account in its ruling as to the Rule 59 motion. 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Likewise on the point that the "serious weight of the legal rights involved" must be taken into account on a Rule 59 motion, in Dimick v. Schiedt 293 U.S. 474 (U.S. 1935) in a personal injury action, the district court was held to be without power to condition its denial of the plaintiff's motion for a new trial on the ground of inadequate damages solely upon the defendant's consent to an increase, to a specified amount, of damages awarded by the jury, but instead should have granted plaintiff a new trial. Jud.Code § 269, Fed.Rules Civ.Proc. Rule 59; Fed.Rules Cr.Proc. rules 33, 52, 28 U.S.C.A.; U.S.C.A.Const. Amend. 7

C. A Lack Of Personal Jurisdiction Existed Over The Defendants In View Of The District Court's Finding That None Of The Defendants Were Properly Served, And Defendants Had Entered Only A Limited "Special Appearance". It Was Error For The District Court To Act Further In Disregard Of This Lack Of Jurisdiction And Limited Appearance And Further Error In Not Correcting This Error On Plaintiffs' Motion For Relief

Synopsis: The order is clear in its finding that none of the defendants were timely served. Furthermore, "special appearances" were made by defendants thus limiting their participation based on that self-stated special appearance. The court thus lacked personal jurisdiction over the defendants by its own finding, and it was error for the trial court to disregard this finding and proceed to rule on other matters when the parties were not at issue and no personal jurisdiction.

Argument: Under Rule 12(b)(2) of the *Federal Rules of Civil*

Procedure a complaint may be dismissed for lack of personal jurisdiction, unless Plaintiff can show good cause for the Court to extend the time allowed for proper service. Broadnax v. Department of Veteran Affairs Washington Mut. Bank, not reported in F.Supp.2d, 2005 WL 1185809 (E.D.Va. 2005); See also Cronin v. Henderson, 209 F.R.D. 370 (D. Md. 2002). The trial court explicitly finds in its order that none of the defendants were properly served with process. Dismissal would lie at the outset on this ground alone, and calls into question any subsequent action by the trial court. The parties were not at issue and no personal jurisdiction existed over the defendants. However the trial court's Dismissal Order inconsistently proceeded to make statements as to other matters as though there had been proper service, and this plaintiffs submit was error, which the trial court had opportunity to correct on the Motion for Relief but failed to do so and that too is reversible error.

Instead, the Complaint in the underlying action here was improperly dismissed after a finding of defective service thus with no jurisdiction over defendants. The subsequent prejudicial dismissal was evidently done, however, on other un-specified grounds, without any Discovery evidence as to the merits. The un-specified grounds for the dismissal and why it was done with prejudice makes argument on appeal difficult without speculation and conjecture. It is assumed that the trial court's dismissal and then imposing the extreme sanctions were, in reality, based on a failure to appear and contest issues at the first scheduling conference which the trial court must have interpreted as being a willful delay (although, again, such is not stated as a finding in the order). That failure was explained and apologized for at the hearing on the Motion for Relief, and nothing in the record supports any willfulness of plaintiffs in this regard. In addition, it is outside the scope of Rule 11, which is based on the signing of a filing, not non-appearance. It was error that the trial court

reacted in this manner with the harsh consequences of a dismissal with prejudice of a case that not only has never been heard on its merits, but has never had any Discovery so to establish an evidentiary record, but rather rests purely on argument of counsel.

However, the trial court's order is clear in its first, threshold finding made of no service or defective service on all defendants. Further error on this incorrect conclusion is evidenced by the absence by the trial court in making no distinction as to the service that was made on specific defendants, but instead lumped them all together in one broad brush of "no service", without any specific factual support given as to any defendant. Thus no personal jurisdiction existed over defendants and, assuming *arguendo* the trial court was correct on this finding, the proper action was dismissal of the Complaint for failure to effect proper service of process under Fed.R.Civ.P. 12(b)(5), and actions taken thereafter on the merits of the case without personal jurisdiction are void *ab initio*. (Koehler v. Dodwell, 152 F.3d 304, 306 (4th Cir.1998). In such a situation, the case should have been dismissed for lack of jurisdiction due to failure to make service of process on defendants. That issue should have been re-visited by the trial court on the Motion for Relief which it had the opportunity to do but failed to do so. The trial court, in error, failed to dismiss the case based on either defective service causing a lack of personal jurisdiction over defendants, despite the Order's explicit finding on that point, or on a failure to prosecute. In either case, there is no basis for a dismissal with prejudice or for imposing bankruptcy-loaded sanctions where the reality was a failure to prosecute which is not a signed pleading and outside the grounds for Rule 11 sanctions. Denial of the Motion for Relief as to these matters was error for which the Order should be reversed as an abuse of discretion in both error of law and in causing a manifest injustice.

Clearly, although the court could easily on the Motion for Relief address the problem by simply amending the order of dismissal to the extent of citing the proper procedural reasoning cited above (instead of the summary dismissal without explanation which is what was entered) this type of ad hoc ruling pointlessly covers up the district court's original error of judgment in the first place by, instead, imposing dismissal as a sanction, then adds it to be with prejudice without reason given as a further sanction, then further adds unexplained monetary sanctions without any of the considerations required under Rule 11.

It is significant, and further error, that the trial court's order does not even list the specific defendants to whom the sanctions are to be applied, and without even totaling up and explicitly stating the total sanction amount, which roughly amounts to over a million dollars as applied to both plaintiffs as a third-layer of sanction for failure to appear at the first conference called in the case.

Failure to identify the defendants is significant because the named defendants in the filed cases, and the defendants appearing at the time of both orders, are different. This fact alone leaves considerable confusion and a lack of clarity as to which group of "defendants" the order applies to. Those that were served and did not respond are potentially subject to further action by plaintiffs, yet the trial court did not address, much less resolve, this issue. An order is only final and appealable when ALL issues have been finally decided. The trial court did not rule in its orders on this outstanding issue. And once again, the trial court's imposition of the most harsh actions possible entirely overlooks the merits of the cause of action presented, significant where the assertions made in a Complaint are assumed by law to be true. [INSERT CASE]

If the dismissal was motivated by the goal of improperly

sanctioning the Plaintiff on what amounted to a failure to respond to defendants' initial filings, then altering the reasoning of the district court after the fact of judgment would have failed to correct the court's reversible error even if the trial court had considered and acted on this point with the opportunity presented for doing so by the Motion for Relief, which the trial court declined to do. Instead, the trial court merely disregarded the improper summary reasoning of the first Order as wielded by the district judge at the Motion for Relief stage and entered another summary Denied order also without any factual statements and absent any well-reasoned decision. This denial of the Relief sought which was properly supported in view of the earlier Order has led to the manifest injustice of the Plaintiffs' current circumstance. Plaintiff thus asserts on appeal that it would be a hollow gesture and no remedy at all for the trial court to switch its reasoning now, after the fact, in order to fit the unjust ruling below and thereby hide its own clear error of law in dismissing this Complaint.

The two Orders stand on their own as to the defects therein. Whether a fig-leaf, a band-aid or a mask, the procedural sleight of hand would only worsen the trial court's mistakes. The proper action for this Court is to reverse and remand for further proceedings with all parties before the trial court and able to be heard, furthering the often-stated preference to have matters heard and decided on their merits. A complex Wrongful Death, Medicaid Fraud and other causes of action as presented in this case, in which one person gave the ultimate sacrifice in the struggle amidst the most inhumane wrongs, requires no less to meet the justice and recourse the judicial process is there to provide.

D. Dismissal With Prejudice Was A Further Abuse Of Discretion By The Trial Court

Dismissal with prejudice is not supported by the trial court's orders, and conflicts under the facts of this case with precedent of this Court.

A district court may dismiss an action for lack of prosecution, either upon motion by a defendant pursuant to Federal Rule of Civil Procedure 41(b) or on its own motion. Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974). Because dismissal is such a harsh sanction, however, it "should be resorted to only in extreme cases." Dyotherm Corp. v. Turbo Machine Co., 392 F.2d 146 (3d Cir. 1968). In deciding whether a case should be dismissed, a district court must consider conflicting policies: "(a)gainst the power to prevent delays must be weighed the sound public policy of deciding cases on their merits." Reizakis at 1135.

In McCargo v. Hedrick 545 F.2d 393 (W.Va. 1976) the plaintiff brought actions alleging that the plaintiff's racing license in West Virginia was wrongfully revoked. The United States District Court for the Northern District of West Virginia dismissed the consolidated suits *sua sponte* for failure to prosecute and the plaintiff appealed. The Court of Appeals held that where there was no indication that the plaintiff was personally responsible for the delay that occurred in filing the proposed pretrial order, and that neither she nor her lawyer deliberately engaged in dilatory tactics, and where there was no evidence that the defendants were prejudiced by the delay, the District Court abused its discretion in dismissing the consolidated action.

In Grades v. Gregory 37 F.3d 1493 (Table), 1994 WL 577465 (C.A.4 W.Va.1994) in an unpublished disposition the district court was found to have abused its discretion in denying Grades' motion to dismiss without prejudice and in dismissing Grades' complaint with prejudice. The appeals court in finding an abuse of discretion granted leave to proceed *in forma pauperis*, vacated the dismissal of the action,

and remanded for further proceedings consistent with this opinion. Both error and a manifest injustice would result otherwise.

When like factors are applied to the present case, the balance tips in favor of a trial on the merits rather than dismissal for want of prosecution. There is no indication in the record that the plaintiffs deliberately engaged in dilatory tactics, and the timing of co-plaintiff Morrissey's medical situations, unexpected, were highly frustrating to plaintiffs themselves. On the point of no prejudice to defendants and as discussed elsewhere, defendants excluded plaintiffs from the normal process of getting notice and signing off on the Dismissal Order. The Order itself, written by defendants' counsel, falsely recites that "signatures of counsel are waived". Thus while it was known about by defendants, plaintiffs were excluded from seeing it before the order was entered, contrary to standard practice regarding "notice".

Likewise, also discussed elsewhere, notice of the hearing on plaintiffs' Motion for Relief was never given by the trial court to plaintiffs. Yet, in a very unusual manner, the trial court itself, presumably by the judge's law clerk at the judge's instruction, made a personal telephone call (it was learned later) to a defense counsel informing him of the last-minute hearing being called (on less that a day's notice). Plaintiffs', again, were denied equal treatment as no call was made to them despite the ready availability of plaintiffs' office number. Plaintiff was not even telephoned by the defendant counsel who received the trial judge's telephone call, but instead left a short letter with a draft order the defendant had drafted simply stating that he was moving for entry of the order, ..tomorrow morning! This "notice" was left by hand in plaintiffs' mailbox the afternoon before the next morning's hearing, and only fortuitously did plaintiffs happen to check that box that same afternoon to become aware of it. Even

then, there was no indication that the court had scheduled any hearing, and a quick trip to the USDC Richmond clerk's office showed that they had no listing for the case being on the court's docket either, and in fact, told plaintiffs no need to come to court because the case is not on the docket.

So defendants could hardly say that they had been prejudiced, nor say that keeping plaintiffs out of the loop on these critical occasions was not deliberate. Both instances of critical "notice" could, and should, have been handled differently. Further and as already mentioned above, the district court's order dismissing the consolidated actions does not contain a showing that any other less drastic actions were first considered, as is required. For these reasons, the appellate court must conclude that the district court abused its discretion in dismissing the consolidated actions.

E. THE DISTRICT COURT'S ORDER FOR RULE 11 SANCTIONS WAS CLEARLY ERRONEOUS AND MANIFESTLY UNJUST AND DENIAL OF THE MOTION FOR RELIEF IS REVERSIBLE ERROR OF LAW IN VIEW OF THE VIOLATION OF RULE 11

In imposing sanctions, courts must use the least severe sanction necessary to achieve the desired goals; observing that "the ultimate touchstone of inherent powers is necessity." Byrd v. Hopson, 108 Fed. Appx. 749 (C.A.4 (N.C.) 2004), citing Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 86 F.3d 464, 467-68 (5th Cir.1996).

The District Court's Imposition Of Sanctions Under Rule 11 Of The Federal Rules Of Civl Procedure Must Be Reversed As A Violation Of The Requirements And Standards Of Rule 11.

Introduction. Most Rule 11 cases found seemed to be based

more on allegations of baseless filings (the first two ground set forth in In re Kunstler, discussed *infra*) rather than for improper purpose (the third ground, and basis for the Rule 11 action by the district court). Hence most case law presented is irrelevant in that it deals with different grounds on which the R11 issue is based, but nonetheless contains other points still relevant to the issue in its context of the present case.

This section is presented as supplemental material to that already presented on the same issue in the previously filed *Appellants' Informal Brief.*

Issue: Whether the district court erred in assessing Rule 11 sanctions against appellants.

The district court erred in its assessment of Rule 11 sanctions against appellants. This error exists as to a failure to comply with the Rule's procedural requirements, a failure to comply with the Rule's substantive requirement of a signed document being filed for an improper purpose, and a failure as to the amount assessed which totals aprox. $1.2 million against two plaintiffs based on the district court's conclusory finding that the purpose of plaintiffs' in filing their case was to harass defendants.

Argument:

The fact that Rule 11 is limited to the signing of a pleading, and not as to conduct during the proceedings, is made clear in the language of the Rule itself.

Fed.R.Civ.P. 11 provides in pertinent part:

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and

is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation····"

The three elements of a Rule 11 inquiry are: (1) whether the plaintiff made a reasonable inquiry to determine that the signed document stood well grounded in fact; (2) whether the plaintiff made a reasonable inquiry to determine that the signed document was warranted by existing law or its reasonable extension or modification; and (3) whether the complaint was filed for an improper purpose. In re Kunstler, 914 F.2d 505 (4th Cir.1990).

(1) The District Court Failed to Satisfy Rule 11's Substantive Requirements *And* No Specific Findings Or Rationale Are Set Forth By The District Court To Support Its Summary Issuance Of Rule 11 Sanctions.

In its order, the district court in the present case concluded (without provided factual support) that the improper purpose for which plaintiffs filed their case was for the purpose of harassing the defendants. Thus the district court's assessment of $600,00+ as to each of the two plaintiffs (= $1.2+ million) as sanctions is based on the third ground set forth in In re Kunstler, i.e. that the complaint was filed for an improper purpose. Lacking in the order, however, is the recitation of finding of facts on which this conclusion is based, i.e. What facts establish that plaintiffs' intent in incurring plaintiffs' own enormous expense and effort of filing this case show that it was done for the purpose of harassing defendants? There are none.

The R11 issue in the case of Sauls v. Penn Virginia Resources Corp., 121 F.R.D. 657 (W.D.Va.1988), is about

the sufficiency of a pleading and whether it is frivolous under R11, and not to an "improper motive" which is the different basis for the R11 sanctions in the present case. The second of the two points decided in Sauls, however, confirms the fact that Rule 11 action is based on the signing of a document, and not to be used for other purposes, such as a punitive measure for failure to appear or respond or for conduct generally during the case proceeding.

In Sauls, the court determined that the plaintiff's argument was "misplaced, but not unreasonable, and therefore, not violative of Rule 11" further surmising that the plaintiff (as to an issue in that particular case) had based his arguments on a legal theory of personal jurisdiction in the past only partially rejected by the court. Even while rejecting the plaintiff's legal position the court stated, "the plaintiff's argument is not so lacking in legal foundation as to warrant the imposition of sanctions." The court did not feel any differently about the second ground proposed for issuing sanctions (failing to cooperate or respond appropriately to a party request to be dismissed from the lawsuit). Especially relevant here, the Sauls court stated, "Rule 11 "does not purport to be a means for district courts to sanction conduct in the course of a lawsuit ··· that does not involve the signing of pleadings, motions, or other papers." Id., citing Simpson v. Welch, 900 F.2d 33, 36 (4th Cir.1990) (per curiam). Accordingly, the plaintiff's failure to dismiss that party was also not grounds for the imposition of Rule 11 sanctions. In sum, because the court could not find, based on the record before it, that the plaintiff's arguments lacked reasonable factual or legal foundation, and non-document signings conduct being outside the scope of Rule 11, the motion for sanctions under Rule 11 was properly denied.

Presumptions By A Trial Court Do Not Support Action Under Rule 11

The recent case of Gallaher v. Waving Leaves, Inc., slip copy, 2006 WL 898130 (N.D.W.Va. 2006) re-states the fact that presumptions are improper as a basis for imposing R11 sanctions. There the district court stated that, "...unless provided with a reason, a court should not assume that a plaintiff's attorney has represented falsely, or did not appreciate, the value of his or her client's case." Id.

Failure To Apply The Requirements of Rule 11 Requires Reversal

In Miltier v. Downes 935 F.2d 660 (C.A.4 Va.1991) the administratrix of a prison inmate's estate filed a civil rights action alleging deliberate indifference to the prisoner's Eighth Amendment rights to adequate medical care. After the United States District Court for the Eastern District of Virginia dismissed the inmate's claim against all prison officials and declined the exercise of pendent jurisdiction, appeal was taken. The Court of Appeals, 896 F.2d 848, affirmed in part, reversed in part, and remanded. The District Court, upon remand of the case, awarded Rule 11 sanctions arising out of the refusal to dismiss three specific claims against the wardens, which counsel appealed. The Court of Appeals Circuit Judge held (1) the fact that counsel's position was rejected upon summary judgment **did not establish that the claims were not "reasonably justified" within the meaning of Rule 11**; (2) further proceedings were necessary **to determine whether it was objectively reasonable for counsel to rely on existing precedent or whether counsel's actions amounted to a good-faith argument for extension of the law**; and (3) attorney fees incurred by the warden's counsel did not necessarily establish the reasonable amount of sanctions. The sanctions were thus vacated and the case remanded.

In Stevens v. Lawyers Mut. Liability Ins. Co. of North Carolina, 789 F.2d 1056 (C.A.4 N.C.1986), the court could only conclude that Steven's declaratory judgment action in the district court appeared to have a reasonable basis in fact and law and did not appear either objectively frivolous or interposed for any identifiable improper purpose. The district court's order imposing the Rule 11 sanctions in the form of a published opinion reprimanding plaintiff's counsel was therefore not entitled to deference and was reversed as an abuse of discretion.

In Rector v. Wykle, 230 F.3d 1353 (Table), 2000 WL 1294238 (4th Cir. Va. 2000), unpublished disposition, this Court found that because an incorrect standard was used (assessed fees being determined under sect. 1988 as opposed to R11), it was impossible to determine whether the district court abused its discretion in setting the amount of the sanction. The court therefore vacated the judgment of the district court and remanded the matter.

Rule 11 Requires Specific Findings Be Made As A Condition Precedent To Any Assessment of Sanctions

Subsection (c) of Rule 11 mandates procedural requirements of the Rule, such as that a party may move for sanctions only after affording the adverse party notice and a 21-day period in which to withdraw the offending pleading ("Safe Harbor") and such motion "**shall describe the specific conduct alleged to violate subdivision (b).**" *Id.* at 11(c). Rule 11 (c)(3) Order further sets forth: **When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.** Similarly, when *sua sponte* issuing an order to show cause why litigation misconduct sanctions should not be imposed, **the court first must particularize**

behavior it deems sanctionable. Carefirst of Md., Inc. v. First Care, P.C., 422 F.Supp.2d 592 (E.D.Va. 2006.)

A District Court's obligation to make specific findings when ruling as to Rule 11 sanctions was critical to the decision in Miltier v Beorn 896 F2d 848, later app 19 FR Serv 3d 1177 (CA4 Va. 1990). In that civil rights action by the administratrix of the estate of a prisoner found dead in her cell from heart attack, in which the administratrix alleged that the defendant prison officials' deliberate indifference to the prisoner's medical needs and in which the trial court dismissed the action before trial, the trial court was found to have erred in denying Rule 11 sanctions to the prison officials where it **failed to make specific findings** in support of the denial.

In addition to satisfying the procedural requirements recognized and promulgated by the Fourth Circuit, district courts in this jurisdiction must also refrain from looking to "extrajudicial sources" when imposing sanctions under Rule 11. Ervin v. Traxler, 829 F.2d 35 (C.A. 4 S.C. 1987)(unpublished disposition), reversing the imposition of sanctions and **remanding the case to the district court with instructions that a different judge consider whether a sanction should be applied.**

Regarding Improper Use of Rule 11 to Enjoin Future Conduct

Using Rule 11 as a basis for enjoining future conduct was sharply struck down by this Court in the case of In re Sargent, 136 F.3d 349 (C.A.4 Va.1998). There a state prison inmate brought a § 1983 action against the warden and other prison officials, alleging that they violated his constitutional rights by intentionally subjecting him to harmful prison conditions. The United States District Court for the Western District of Virginia entered an order imposing Rule 11 sanctions against the Assistant Attorney General for the Commonwealth of Virginia, by enjoining application of a Prison Litigation Reform Act (PLRA) provision to the inmate. The Assistant Attorney General appealed and the Circuit Judge reversed in saying that (1) the AG's argument did not so **lack any chance of success under existing law so as to violate Rule 11**; and (2) even assuming the attorney violated Rule 11, the district court had abused its discretion **in choosing the particular sanction imposed** of enjoining the plaintiff as to future filing resources. Accordingly this Court reversed and dismissed the Rule 11 sanctions.

The Calls for Restraint as to Overuse of Rule 11

The Court in Howell v. Nesbit, 149 F.3d 1168 (C.A.4 N.C. 1998 (Unpublished Disposition)) specifically argued for restraint in exercising the inherent power of sanctions at the court's own initiative. The previous court's award of sanctions was deemed to have been based on a finding of "frivolousness" and the action being "without basis in law". However the appeals court noted that the previous court failed to find that plaintiff commenced the action in bad faith and reversed.

On the other hand the district court may not entirely overlook substantive grounds in its assessment of R11 sanctions by relying exclusively upon Rule 11's required procedural rules. The typical decision to assess sanctions under Rule 11 against a litigant has been held to be duly grounded in both procedural AND substantive requirements. As to substance for example, in Meadow Ltd. Partnership v Meadow Farm Partnership, 816 F2d 970 (1987 CA4 Va), the district judge's dismissal of a motion for sanctions **without considering the motion on its merits** was clearly improper where the district judge simply attempted to dispose of the motion summarily on procedural grounds alone, thereby ignoring the actual post-removal conduct of the litigants. In the present case, the district court was silent throughout as to the merits of the case.

As affirmed in Coe v. CMH Homes Slip Copy, 2006 WL 1932664 (M.D.N.C. 2006), it was held that once the Complaint in that case was dismissed by the court, sanctions were arguably unwarranted and any motion for Rule 11 sanctions rendered moot in light of the court's final resolution of the case.

In Simpson v. Welch, 900 F.2d 33 (C.A.4 Va.1990), where the appellees' motion for attorneys' fees and costs rested on, not one, but a number of grounds and because the district court appeared to rely primarily on Rule 11, the award of fees and costs was vacated and the sanctions issue remanded for consideration of **alternative bases** for such an award. The court found that **even if** the district court had properly dismissed the appellant's complaint for failure to state a claim upon which relief could be granted and for failure to comply with court orders, the district court nonetheless improperly ignored other less harsh grounds for imposing the sanctions on appellant's counsel. **Rule 11, furthermore, did not provide sufficient statutory authority**

for the sanctions in light of the option of other resources, and the judgment of the district court was accordingly vacated in part and remanded for further consideration.

In Ashton v. City of Concord, N.C., 337 F.Supp.2d 735 (M.D.N.C.2004), the court considering whether Rule 11 sanctions were merited actively looked for ways to forgive the errors of law in the offending party's pleadings so as not to assess any sanctions. The court noted relevant information omitted from a brief in support submitted to the court "Perhaps it would have been better for Defendants' counsel to include this information earlier in their brief ..... but the delayed inclusion of this information did not mislead the court. Second, contrary to some existing legal precedent ".....the court could have considered this information as at least some evidence of wrongdoing." Third, when faced with the party's mis-statement of key airport regulations and mischaracterization of their import, the court inferred that "Language in statutes, regulations, or contracts is frequently subject to more than one interpretation. That the parties to a lawsuit might present differing views on the meaning of certain language is hardly surprising. The court concludes that Defendants' interpretation of the regulations is reasonable, and thus not worthy of sanction under Rule 11."

In Maryland Nat. Bank v. M/V Tanicorp I, 796 F.Supp. 188 (D. Md. 1992), even where the Court was sympathetic to the movant's arguments for Rule 11 sanctions, it did not finally believe that the subject conduct and pleadings were insufficiently grounded in either fact or law to justify the Court's granting of sanctions. The other side's assertions that movant misled the Court were equally without foundation. Thus, and citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), both defendants' and plaintiff's motions for Rule 11 Sanctions were denied.

In Edmonds v. Gilmore 988 F.Supp. 948 (E.D.Va.1997) the Court denied a motion for sanctions where it found that the plaintiff had articulated objectively reasonable claims. While the claims were, as a matter of law, insufficient to survive the defendants' Motions to Dismiss and for Summary Judgment, the circumstances of disqualification and the importance of safeguarding the electoral process far outweighed the defendants' arguments. "Although a legal claim may be so inartfully pled that it cannot survive a motion to dismiss, **such a flaw will not in itself support sanctions against an attorney...**".

The case of Wagner v. Allied Chemical Corp., 623 F.Supp. 1407 D.C. (Md.1985), is an example of avoiding use of R11 where other measures are available, as required under Rule 11. Although Wagner relates to the filing of a arguably frivolous Complaint, which is not the basis for the R11 sanctions in the present case, the decision's reasoning in seeking alternative solutions is instructive.

In Wagner the court found that the plaintiffs' attorney conducted an inquiry which fell within the range of reasonableness prior to filing its action. The court was persuaded that sanctions would be improper despite defendants' pointing out of **serious factual weaknesses with several of the plaintiff's claims.** To counterbalance this, the court duly weighed that the plaintiffs' attorney consult with an expert, talked to claimants, and received an oral opinion from a doctor who examined most of the claimants prior to filing. What the court discovered was enough to avert sanctions under Rule 11. The court stated, "If defendants have concluded that there is insufficient evidence to maintain a claim and no genuine issue as to any material fact exists, then the correct procedure would be to move for summary judgment pursuant to Rule 56, Fed.R.Civ.P., rather than seek dismissal through Rule 11, as they do in this motion. Therefore,

defendants' motion for sanctions under Rule 11 is denied, and plaintiffs' countermotion for sanctions is denied.

And perhaps the best case of judicial restraint as to use of Rule 11 is found in the case of Wilkerson v. Hester 114 F.Supp.2d 446 (W.D.N.C. 2000) in which the court recommended that counsel and its client be granted the opportunity to extricate themselves from possible contempt, Rule 11 violations, and possible criminal prosecution for what appeared to be ***prima facie*** **perjury in their pleadings** by retracting the offending pleadings.

(2) The District Court Failed To Satisfy Rule 11's Procedural Requirements *And* No Specific Findings Or Rationale Are Set Forth By The District Court To Support Its Summary Issuance Of Rule 11 Sanctions.

The express procedural requirement applicable to courts considering sanctions as set forth in Rule 11(c) were essentially ignored by the District Court in this case. By not sending plaintiffs a copy of the proposed order for endorsement as per standard procedures, and at that being an order drafted by defendants' counsel, and further incorrectly stating thereon that counsel had waived signature, which plaintiffs had not, the court did not provide plaintiffs' the required "notice and a reasonable opportunity to respond" before imposition of the sanctions as required by Rule 11(c).

The case of Garrett v. Martin, 229 F.3d 1142 (C.A.4 Va. 2000), is pertinent to this point as it states: "The remaining sanctions -- limiting future actions and requiring Garrett to file an affidavit along with all future complaints -- are in the nature of a pre-filing review order. For these sanctions as well, the court should have notified Garrett that it was considering such measures and allowed Garrett to defend his conduct ..... Because the court did not provide Garrett notice

and an opportunity to respond before imposing sanctions, we vacate the sanctions order and remand for the court to do so." Id.

This required court "notice" rule was applied just this past year in Go Computer, Inc. v. Microsoft Corp., 437 F.Supp.2d 497 (D.Md. 2006), where the court struck all allegations in an amended complaint underlying the claims asserted by GO for any injury allegedly suffered by Lucent as a competitor of Microsoft. In accordance with the mandatory Rule 11(c) directive that a court should provide a party with notice and a reasonable opportunity to respond before imposing a sanction, GO was allowed to move for reconsideration on or before a date certain to challenge the order striking the Lucent allegations. Id.

By denying plaintiffs the opportunity to review the draft order in the present case before it was entered, yet defendants did have such notice, plaintiffs were denied this required notice under Rule 11, as per Go Computer, Inc., *supra*.

(3) The Staggering And Unsupported Amount Of The Rule 11 Sanction Is Evidence Of An Extreme Abuse Of Discretion

The only remaining inquiry is whether the amount of the sanctions award was proper, and this assumes *arguendo*, as it must, that any R11 action at all is properly supported. In ordering a monetary sanction, the district court is required to consider: **(1) the reasonableness of the opposing party's attorney's fees, (2) the minimum sanction necessary to deter, (3) the ability to pay, and (4) factors relating to the severity of the Rule 11 violation.** Kunstler, *supra*, at 523 " Furthermore, "a district court is required to choose the least severe sanction adequate to accomplish the purpose of Rule 11." Id. It is necessary for the court in imposing Rule 11

sanctions to look at the violator's ability to pay. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A. The district court's order is clear on its face that it failed to take into account any of these factors.

Excessive Rule 11 sanctions

The nature of the sanction imposed, e.g., dismissal of the offending claim or defense, is itself dispositive of the claim or defense." Giganti v. Gen-X Strategies, Inc., 222 F.R.D. 299 (E.D.Va. 2004). In Giganti a media consulting company and its principal sued a provider of Internet-related services, alleging claims under Racketeer Influenced and Corrupt Organizations Act (RICO), Truth in Lending Act, and other claims relating to the provider's collection efforts. The provider moved to dismiss and eventually moved for sanctions. The District Court found: (1) the Rule 11 sanctions were excessive. **The judge granted sanctions to compensate the defendants for fees related to all claims, and the sanctions were not warranted on all claims.** Id. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A. In another case of excessive R11 assessment, in Thomas v. Treasury Management Ass'n, Inc., 158 F.R.D. 364 (D.Md.1994), the court held that even if the employee's conduct was sanctionable, the requested amount was excessive and the employer was not entitled to sanctions under the discovery rules, i.e. the purpose and scope of Rule 11 had been exceeded.

In McGlothlin v. Murray 54 F.Supp.2d 629 (W.D.Va.1999) after remand for further proceedings on the issue of whether to reduce an attorney fee award against a plaintiff prison inmate who brought a frivolous § 1983 action against prison officials and prison chaplain, the District Court held that a reduction of the award from $28,719.25 to $900 was appropriate **in light of the plaintiff's inability to pay**

and out of concern that the large award would discourage other inmates with viable claims.

As to the deterrence objective cited by the proponents of stringent Rule 11 sanctions, the opinion in Classen Immunotherapies, Inc. v. Biogen IDEC, 381 F.Supp.2d 452 (D.Md. 2005), reaffirms yet again that in imposing sanctions, the court should apply a sanction that furthers Rule 11's purpose and is the least severe sanction adequate to such purpose. Yorkridge-Calvert Sav. & Loan Ass'n v. Dir. of the Office of Thrift Supervision, 1990 U.S. Dist. LEXIS 18623 (D.Md.1990) (citing Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir.1988)). "The dismissal of Classen's claims against the Kaiser Defendants should be sufficient to discourage Classen from filing additional pleadings before conducting a reasonable prefiling inquiry." (without the need to add further sanctions).

II. THE INITIAL ORDER ENTERED BY THE DISTRICT COURT DID NOT RESOLVE ALL ISSUES AS TO ALL DEFENDANTS AND THUS WAS NOT A FINAL ORDER

In Millville Quarry, Inc. v. Liberty Mut. Fire Ins. Co. 217 F.3d 839 (Table), 2000 WL 1005202 (C.A.4 W.Va. 2000) in another unpublished disposition, the Fourth Circuit found the procedural posture of the case problematic enough to call the district court's judgment into doubt. In ruling in favor of remand the court commented, "The district court failed to resolve all claims, yet it expressly dismissed all claims with prejudice...". We find this problematic because either the self-styled "final judgment" is indeed a final judgment which finally determines all matters in dispute, or it is not a final judgment, and therefore not subject to appeal except on an interlocutory basis. See, 28 U.S.C. §§ 1291, 1292; Catlin v. United States, 324 U.S. 229 (1945) ("A 'final

decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). In the present case, plaintiffs sought Declaratory Judgments in the Complaints filed in each of the eight cases. The trial court never acted on, nor addressed, the Declaratory Judgments sought. (Statute of Limitations, for example, goes only to damages, not as to other relief sought. Further as discussed *supra*, the trial court did not address the named defendants and service as to them who did not appear in the case at the time of the two orders.

The district court thus had not decided all issues presented and the Order was therefore not a final order but was subject to appeal only on an interlocutory basis. The Motion for Relief gave the trial court opportunity to correct and in its summary denial action, it chose not to do so, and this too constitutes reversible error.

A. The District Court Failed To Rule On The Declaratory Judgment Sought By Appellants And Thus The Order Entered Did Not Resolve All Issues And Was Not A "Final Order"

The district court's failure to rule as to the Declaratory Judgments sought left issues before the court that it had not resolved. The order was therefore not a final order, and was subject only to an interlocutory appeal.

B. The District Court Failed To Rule As To Defendants Named In The Cases As Filed That Did Not Participate In The Case And Thus The Order Entered Did Not Resolve All Issues As To All Defendants And Was Not A "Final Order"

The district court's failure to rule as to defendants named in the complaint, but who were not represented and did not

participate at the hearing from which the dismissal order emanated, leaves open and unresolved the status of the case as to these other defendants. This left issues not ruled on before the court, and thus the order was not a final order for this reason, as to be a final order, the order MUST resolve ALL issues and leave nothing further for the court to do. This being the case, it was error for the district court to proceed by leaving these two categories of issues unresolved and for which the rules on finality of judgments require that the case be remanded.

The District Court's Order Is An Interlocutory Judgment, Not A Final, Appealable Order As To Declaratory Relief And Action Still Outstanding As To Other Defendants Named In The Complaint.

It is Plaintiff's contention that the final order dismissing the Complaint herein was not a final, appealable order but an interlocutory ruling, especially so if the statute of limitations was, assuming arguendo, the basis for dismissal for it speaks to damages alone.

A 'final decision' generally is one which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). In Catlin the district court found the defendant liable but delayed awarding damages until a hearing was held to determine their existence and amount. The court observed it was "obvious" that there was "something else for the district court to do but execute the judgment." The court had not finally determined the respective rights and liabilities of (all the parties)...".

In Pierce Sales Co., Inc. v. Hunt 857 F.2d 1469 (C.A.4 Md.1988) **Unpublished Disposition** the district court's orders granting summary judgment for Pierce on its breach of

contract count, one as to liability and one as to damages, **were not final orders because they did not dispose of Pierce's fraud and misrepresentation claims against Hunt**. *See* Fed.R.Civ.P. 54(b); *Schnur & Cohan, Inc. v. McDonald,* 328 F.2d 103 (4th Cir.1964). As the orders appealed from were not final, they were not appealable under 28 U.S.C. § 1291. "The district court has not directed entry of final judgment as to particular claims or parties under Fed.R.Civ.P. 54(b), nor are the orders appealable under the provisions of 28 U.S.C. § 1292. Finally, the orders are not appealable under the collateral order doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Finding no basis for appellate jurisdiction, we dismiss the appeal as interlocutory.

III. THE DISTRICT COURT ERRED IN STATING THAT APPELLANTS HAD WAIVED SIGNATURE AND ENDORSEMENT OF THE DRAFT ORDER OF DISMISSAL AND SANCTIONS, THUS EXCLUDING APPELLANTS OF THIS RIGHT AS TO A MOST CRITICAL ENTRY, WHILE ACCORDING THAT RIGHT OF NOTICE PRIOR TO ENTRY TO DEFENDANTS

The underlying order states thereon that "counsel waive signature". This if fact is not correct, as plaintiffs never waive their right to review and endorsement of the draft order (an order written by defendants' counsel at that) prior to its entry. Plus, this was a most critical entry in the case, being a dispositive order. Defendants, to the contrary, had notice of this and whether they chose to endorse the order or not, they had that choice and were keep "in the loop" as to this event. Plaintiffs were not. They were never sent the proposed order prior to its entry so to allow them opportunity for review and endorsement in a manner as appropriate, and the order incorrectly says that they waived this important right, which

they did not. This constitutes error for which the orders appealed from should be reversed.

IV. THE ASSIGNMENT OF THE CASE TO A JUDGE FROM NEW YORK WAS IMPROPER AND ERROR

Related to and incorporated in this assignment of error is plaintiffs' assignment of error based on improper consolidation of the cases and improper venue in the transferring of the case to the USDC in Alexandria which had no relation to the case.

Appellants further cite as error the fact that this matter was assigned to and heard by a trial judge who is not a member of the Virginia State Bar and is not assigned to a Virginia Federal Court. This judge is a New York State Federal Court judge, based on the limited information that was available (and the clerks in the clerk's office had little more information than that also). To sit in hearing criminal pleas, which were all of the cases that preceded this one civil case on the docket that day, is one thing. However, to sit in deciding issues that intimately involved application of Virginia law in a major and complex civil litigation – one that equates on the criminal side to that of murder – is quite another. The fact that the trial judge was not aware of appellants' filings that had been made in the case, which was clear as evidenced by the law clerk having to repeatedly come up to the bench for consult throughout the hearing, and no reasoning was given as to the considerations of the court on the substance of the Motion for Relief from Judgment, but rather, another summary denial, is cause for concern.

In the context of fixing the venue of a case in the appropriate court, it has been held that the "interest of justice", within the meaning of 28 U.S.C. § 1404, includes such concerns as having the case heard by a judge who is

familiar with the applicable law. *See Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989). It has also been observed that it is desirable that a federal judge in a diversity case be familiar with the state law which must be applied. *See Caspary v. Louisiana Land & Exploration Co.*, 707 F.2d 785 (4th Cir. 1983) (court of appeals accords substantial deference to opinion of federal district judge because of his familiarity with the governing state law in a diversity action); *United State v. Burnsed*, 566 F.2d 882 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (court of appeals defers to conclusion reached by district judge whose service as a state and federal judge has made him familiar with the laws of the state).

Case Law Strongly Supports Local Judicial Involvement And Speaks Against Assignment of Cases To Those Less Familiar With Local or State Law of the Case.

The importance of the presiding judge's knowledge and experience vis-as-vis local law and custom is well-established at all levels of the federal court. In Salve Regina College v. Russell 499 U.S. 225 (U.S. R.I.1991) the court observes that it has traditionally given special consideration or "weight" to the district judge's perspective on local law. (Citing Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956)) ("Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is"); United States v. Hohri, 482 U.S. 64, 74 (1987) ("[L]ocal federal district judges ··· are likely to be familiar with the applicable state law···· Indeed, a district judge's determination of a state-law question usually is reviewed with great deference"); Bishop v. Wood, 426 U.S. 341, 346, and n. 10 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of

the state-law issue without such guidance might have justified a different conclusion")

The U.S. Supreme Court is no different in observing the value of intimacy with local custom and law. ".....where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges 'familiar with the intricacies and trends of local law and practice.' " Lawrence, *supra*, at 180 (SCALIA, J., dissenting) (quoting Huddleston v. Dwyer, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246 (1944)). See also Conner v. Simler, 367 U.S. 486 (1961); cf. Omaha Nat. Bank v. Nebraskans for Independent Banking, Inc., 426 U.S. 310 (1976) (GVR'ing in light of an intervening state statute). Thomas v. American Home Products, Inc. 519 U.S. 913 (U.S.1996); See Also Stutson v. U.S. 516 U.S. 163 (U.S.Ala.1996)

In U.S. v. Hohri 482 U.S. 64 (U.S.Dist.Col.1987) the court comments, "There may have been a concern that Federal Circuit judges would not be familiar with questions of state tort law. But this problem is mitigated considerably by the fact that these cases are tried before local federal district judges, who are likely to be familiar with the applicable state law. Indeed, a district judge's determination of a state-law question usually is reviewed with great deference. E.g., Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (review by this Court); Alabama Elec. Cooperative, Inc. v. First National Bank, 684 F.2d 789, 792 (CA11 1982) (review by a Court of Appeals). In Bishop v. Wood 426 U.S. 341 (U.S.N.C.1976), in dealing with issues of state law that entered into the judgments of federal courts, the court was "hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." In Township of Hillsborough v. Cromwell,

326 U.S. 620, 629-630, the Court stated: "Petitioner makes an extended argument to the effect that Duke Power Co. v. State Board, 129 N.J.L. 449 is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.' (Citing *Huddleston*, supra). Another court in Loper v. Beto (U.S.Tex. 1972) 405 U.S. 473 confirms this perspective of the local judge's knowledge and experience being paramount, this time in cases involving profound constitutional issues. "It is a sufficiently difficult task for a federal district court sitting in Texas to review a Texas state criminal proceeding for constitutional error; in that case the Texas state custodian himself is a defendant in the proceeding, all counsel and the district judge are familiar with local Texas criminal procedure, and the State and petitioner both have available such witnesses as may be necessary to augment the record pertaining to the judgment under attack. Whatever evidentiary hearing is held will take place in the general locale where those witnesses who have knowledge of the earlier state proceedings are available to testify.[4]

The court in Van Dusen v. Barrack, 376 U.S. 612 (U.S.Pa. 1964) adds to this in its statement that "Thus, to the extent that Pennsylvania laws are difficult or unclear and might not defer to Massachusetts laws, it may be advantageous to retain the actions in Pennsylvania **where the judges possess a more ready familiarity with the local laws.**

Finally, reaching all the way back to the early case of Madruga v. Superior Court of State of Cal. in and for San Diego County 346 U.S. 556 (U.S. 1954) the court notes that "Easily accessible local courts are well equipped to handle these essentially local disputes. Ordering the sale of property for partition is part of their everyday work. Long experience

has enabled states to develop simple legislative and judicial partition procedures with which local judges and counsel are familiar. Federal courts have rarely been called on to try such disputes and have established no settled rules for partition. In some parts of the country the inaccessibility of federal courts as compared with state courts would cause needless expense and inconvenience to parties. We have no reason to believe federal procedure if applied to partition cases would be simpler, speedier, less expensive or fairer than the procedures of state courts. Nor are we convinced that any theoretical benefits to shipping would justify us in restricting the partition jurisdiction of state courts by fashioning an exclusive national rule to govern quarreling shipowners. Cf. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282.

The present wrongful-death action, which involves numerous intricacies and peculiarities of Virginia law, was assigned to a United States District Judge from the State of New York. Throughout the proceedings, the district court demonstrated and expressed a fundamental lack of familiarity with the Virginia law that governs this case. This is a complex matter, which was further complicated by personal connections and affiliations requiring the recusal of numerous judicial officials from the local area. It was of paramount importance that a judge familiar with the governing local law, and able to apply that law under difficult circumstances, be assigned to hear this matter. This was not done. On frequent occasions during hearings on this matter, the district court appeared both confused by the legal arguments and uninterested in the controlling facts, with repeatedly needing sidebars with his law clerk prior to responding on facts and issued being argued. For these reasons, the interest-of-justice concerns were not satisfied by the assignment of a judge familiar with New York but not Virginia law, and this matter should be remanded for a new trial before an appropriate judge.

V. THE DISTRICT COURT ERRED BY FAILING TO MAKE FINDINGS OF FACT UPON DISMISSING THIS ACTION ON THE GROUND THAT ALL PLAINTIFF'S CLAIMS, AS TO ALL DEFENDANTS, ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.

It is axiomatic that an appellate review to determine whether the rulings by the district court are clearly erroneous can be undertaken only when the lower court has entered findings of fact with sufficient detail and exactness. *United States for the use of Belcon, Inc. v. Sherman Construction Co.*, 800 F.2d 1321 (4th Cir. 1986). The duty to make findings of fact after a bench trial exists independently of any request by a party to the litigation. *Id.* at 1324. If a district court fails to make the requisite findings of fact, its conclusions of law cannot be sustained. *Darter v. Greenville Community Hotel Corp.*, 301 F.2d 70 (4th Cir. 1962). Therefore, it is essential that the trial court find the ultimate facts upon which its conclusions of law and judgment are based. *Id.* at 75. A district court's determination that a claim is barred by the applicable statute of limitations requires findings of fact as to the accrual of the claim, so that it may be determined upon review whether the claim is time-barred. *See C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296 (Fed. Cir. 2000). Moreover, a district court is required to make findings of fact in ruling upon a motion for sanctions to ensure that the sanctions address the excess costs resulting from the misconduct, to provide the sanctioned party an adequate opportunity to respond, and to facilitate meaningful appellate review. *National Loan Investors, L.P. v. Wester Sugar Co.*, 366 F. Supp. 2d 881 (D. Neb. 2005). No discussion was made of the "Safe Harbor" provisions of R11; nor which defendants actually filed for R11 sanctions, what specific amount and its basis was pleaded; nor the appropriateness of any amount sought, such as by attorney time and expense

details and limited to that attributed to plaintiffs' signing of a frivolous (without any basis in law or in fact) document, as opposed to the ordinary costs of litigation which each side must bear.

In the case at bar, the district court's May 30, 2006 Order dismissing the Plaintiff's cases pursuant to the applicable statutes of limitations, and imposing substantial Rule 11 sanctions on the Plaintiff, contains findings of fact that are sparse and inadequate at best. In fact, the Order is so deficient in this regard that it is impossible to determine the specific factual grounds upon which the Plaintiff is being required to pay over $600,000.00 in sanctions. (*See* Order, dated May 30, 2006, at 2.) Therefore, neither the Plaintiff nor the reviewing court has any basis to know whether the amount of the sanctions addresses the excess costs caused by the Plaintiff's asserted misconduct, and what constituted such misconduct. Moreover, in light of the inadequacy of the findings of fact, the Plaintiff was given no reasonable opportunity to respond to the imposition of the sanctions by the district court.

As to the dismissal on the ground that the Plaintiff's claims are barred by the governing the statutes of limitations, the court's Order contains *no* findings of fact to support such a legal conclusion. (*See* Order, dated May 30, 2006, at 1.) The court's Order thus overlooks the fact that each of the Plaintiff's multiple causes of action is governed by a separate Virginia statute of limitation, and had a separate accrual date and a separate period of limitation. In failing to enter findings of fact as to which statute of limitation applies to each cause of action, and when each cause of action accrued, the district court has made it impossible to review the judgment for legal error. Further, this analysis must be applied as to each defendant given their differing times of involvement in the underlying conduct complained of. On this ground alone, the

case must be remanded for appropriate action by the district court. For these reasons, the district court's Order is fundamentally flawed, and the case must be remanded for appropriate proceedings below.

VI. Virginia Law As To Venue Will Be Applied Where It Is Not Preempted By A Federal Statute.

Venue on appeal is reviewed *de novo*.

This case was filed in the United States District Court in Norfolk and was transferred to the United States District in Richmond as the preferred venue. All Richmond judges recused themselves from the case due to conflicts. The Richmond court then, for non-specific reasons, transferred the case to the United States District Court in Alexandria. It is a fundamental principle of law that determining the proper venue in the federal system is a question of federal law. 28 U.S.C. §§ 1332, 1441, and 1446; Leroy v. Great Western United Corp., 443 U.S. 173, 183 (1979).

Venue in this case is not preempted by any federal statute. Based on Virginia law and 28 USC 1404, the relevant factors weigh in favor of transfer of the case back to Norfolk. heavily outweigh those against Norfolk as a venue. "Ordinarily," stated the court in In Glamorgan Coal Corp. v. Ratners Group, PLC 854 F.Supp. 436 (W.D.Va.1993), the plaintiff's choice of forum should be given great deference and it is the defendant's "burden to disturb the plaintiff's choice of forum by showing that the balance of equities is in [its] favor [and] that judicial economy and convenience to all parties favor suit in another forum." Id. Here there is nothing to connect this case with Alexandria, the deference given to the Plaintiff's choice should be entitled to great weight.

Further supporting the notion that a federal court is correct in applying state venue law, in Sherman v. Hercules, Inc. 636 F.Supp. 305 (W.D.Va.1986) the court, in evaluating the impact of the venue restriction set forth in Virginia Code § 8.01-380, Title 8.01 Civil Remedies and Procedure, Chapter 13, directly referred to the venue restriction as "a substantive provision of Virginia law" and "therefore applicable to federal diversity cases." Id. citing Yarber v. Allstate Ins. Co., 674 F.2d 232, 237 (4th Cir.1982) M.C. Const. Corp. v. Gray Co. 17 F.Supp.2d 541 (W.D.Va.1998). Plaintiffs are not at this time aware of a federal provision which would preempt Virginia's venue law in the case at bar.

In Iannello v. Busch Entertainment Corp. 300 F.Supp.2d 400 (E.D.Va.2004) the court re-affirms §1404(a)'s prescription that "where a case is transferred from one district in which venue is appropriate to another more convenient venue, **the transferee district court must apply the state law that would have been applied had there been no change of venue.** State law requires here that plaintiffs' choice of venue be honored, and the district court's transfer of the case to Alexandria constitutes reversible error.

Preference in following a plaintiff's choice of venue is seen by the court's statement in City of Danville v. Virginia State Water Control Bd., 18 Va. App. 594 (Va. App. 1994): "In sum, the findings by the Lynchburg Circuit Court are insufficient to **overcome the presumption of correctness that attaches to the plaintiffs' choice of venue...**"

Likewise, In Design88 Ltd v. Power Uptik Productions, LLC 133 F.Supp.2d 873 (W.D.Va.2001) the court performed a *de novo* review on a venue issue and ended up honoring the plaintiffs' choice of forum.

In all of these contexts the courts held it generally appropriate to defer at least very strongly to the plaintiff's initial choice of forum. The exceptions run towards more deference, not less.

Given aggregation of multiple defendants, several theories of liability and myriad legal issues, this case loudly and clearly support transferring venue back to Norfolk under the Hoffman v. Blaski, 363 U.S. 335, 343-344 (1960) ruling. (denying defendants' transfer motion despite defendants willingness to make waiver concessions).

VII. A SECOND CASE FILED DECEMBER 7, 2005 IN THE USDC NORFOLK WAS WRONGLY ACTED ON BY THE DISTRICT COURT IN TRANSFERRING IT TO RICHMOND PRIOR TO THE TIME ALLOWED PLAINTIFFS FOR COMMENCING SERVICE OF PROCESS IN THAT CASE, AND THE ALEXANDRIA USDC FAILED TO ADDRESS THE STATUS OF THAT CASE AND CLAIMS MADE THERIN, LEAVING A STILL FURTHER ISSUE UNRESOLVED IN WHAT WAS NOT, THEREFORE, A FINAL ORDER.

The Norfolk district court wrongly acted in plaintiffs' second related case filed in that court by prematurely sending it the USDC in Richmond, prior to the time allotted to plaintiffs for making service on defendants. No request had been made for any such action, and the district court committed error in not allowing plaintiffs the time they rightly had by statute for commencing the case with service on defendants. This deprived plaintiffs of their right to control when their filed case would be commenced within the provision of the Federal Rules, and the district court committed reversible error in so acting, and in further

consolidating that case with other cases, untimely, without notice and in violation of the FRCP statute that allows plaintiffs a larger time period, at its election, in which to commence its case. The district court failed to act as to that separate case, its claims and the defendants as named therein. While the case was admittedly similar to the earlier cases filed, it was filed as a separate case, separate filing fee, separate case docket number, and it was error to have acted as stated procedurally in it and error that the district court in its orders failed to address this case.

Conclusion. This appeal has presented for appellate review of two orders which appellants submit are defective on their face in making no findings of fact based on evidence of record, misapplying applicable law, and basically reciting conclusions leaving vague and uncertain vital matters, such as the specific reason for dismissal, reasons for the Rule 11 sanctions, and the considerations made on that action and the exorbitant, over a million dollar amount assessed in taking that action.

Reversible issues are presented that go to the district court's clear finding of no service on any of the defendants, so with no jurisdiction over the defendants, the district court then proceeded to rule on other matters as though it had jurisdiction.

Reversible issues that go to the finality of the order entered are presented due to the absence of rulings as to all defendants listed in the case as filed and failure to act of the issue of Declaratory Judgments sought in each of the cases.

Critical procedural issues on appeal have also been presented that resulted in sever prejudice to appellants, relating to venue and the assignment of the complex case rooted in Virginia substantive law to a New York based judge.

Reversible issues are presented that go to the insufficiency of the notice of the hearing on the Motion for Relief, an absence of addressing the details required under Rule 11 as to both supporting any Rule 11 action and the reasoning behind the huge amount assessed, which was never totaled up as to a total amount and as to which defendants.

Reversible issues are presented that go to the absence of a reason for the dismissal, and only if it is improperly assumed that statute of limitations was involved (can't tell from the order), which is a fact-intensive issue, then the district court's order is fatally defective in its broad brush dismissal without reciting any facts.

WHEREFORE, plaintiffs respectfully request that this Honorable Court issue an order:

Vacating the order of the district court declining to alter or amend its judgment of dismissal pursuant to the Motion for Relief filed by plaintiffs;

Vacate and Reverse the district court's action on plaintiffs' Motion for Relief as being called for hearing on insufficient and improper notice;

Vacate the district court's order of dismissal of the case on grounds that plaintiffs were not given opportunity to review and endorse the order prior to entry and incorrect statement thereon as to plaintiffs' waiver of that right;

Remand the case back to the district court

On remand, direct that venue in the case be in the USDC Norfolk;

Vacate the order of consolidation as prejudicial to the administration of justice in dealing with such multiple causes and multiple defendants;

Remand the case to the district court on the grounds of there not being a final order yet entered that resolves all outstanding issues, as to all claims and all defendants.

Reverse the district court's action in imposing Rule 11 sanctions and in the amount of sanctions imposed as not being in compliance with the provisions of Rule 11;

Reverse the dismissal of the case, and reverse its dismissal done with prejudice;

Provide the relief requested as set forth at the conclusion of plaintiffs' Initial Informal Brief. [(1) the lower court's order be vacated and this case be remanded back to the lower court in the USDC Norfolk; or alternatively, (2) that the order be deemed void on its own finding of a lack of proper service, as per defendants' argument at the outset, and hence lack of jurisdiction].

Alternatively, plaintiffs further respectfully request that the district court be instructed to reconsider the propriety of its consolidation of all cases into this one gigantic case as it now stands; and only if consolidation is left intact, that the trial court allow a reasonable time for plaintiffs to complete their responses, in addition to those already made, to the many multiple motions filed by the multiple defendants, and that the case proceed thereafter according to standard court practice and procedures.

Plaintiffs further request this Honorable Court to grant the relief sought on all issues as presented herein, whether by way

of Vacating and Reversal, or on Remand for further considerations at the district court level.

Respectfully submitted,

ESTATE OF DOROTHY L. MORRISSEY

By:_____

and

_____
Michael J. Morrissey

Estate of Dorothy L. Morrissey
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CERTIFICATE OF SERVICE

I hereby certify that I did mail on this 27th day of October 2006, postage prepaid, a copy of the foregoing Appellants' Corrected Supplemental Brief to the following counsel of record:

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APPENDIX E

Appeal No. 06-1828

Estate of Morrissey v. Lesniak

[Filed September 20, 2006]

INFORMATION IN APPELLANTS' BRIEF
ACCORDING TO THE INFORMAL BRIEF FORMAT

(The numbering that follows corresponds to the numbering in the Court's Informal Brief form. The Lower Court's Order appealed from is attached as Exh. A).

Some facts and arguments apply equally or relate to more than one issue. Thus while plaintiffs have of course listed the issues and arguments separately, they are not intended to be confined or limited to only that issue where relevant on other issues. For this reason, plaintiffs incorporate by reference all facts and argument to all issues so to avoid any strict construction of supporting facts and argument from being equally available where relevant in support of other issues.

1. A. U.S. District Court for the Eastern District of Virginia

   B. Order was entered by the Clerk on 6/7/06 and mailed by the U.S. District Court, but due to an admitted error by the U.S. Post Office the mail was returned and basically delivered back at the District Court. The Post Office acknowledged its error. The Order was re-mailed and received and first seen on 7/14/06 with

the Appeal Notice being filed on that same day and within the 30 days of the mailing.

2. Not applicable (for prisoners only).

3. Issues on Appeal

Overview of Issues Raised

The following is a summary list of issues raised in this appeal made in the format of affirmative statements:

1. The Lower Court erred in imposing Rule 11 sanctions, and further erred in imposing over half a million dollars in Rule 11 sanctions.

2. The Lower Court erred in dismissing the case, and erred further in doing so with prejudice, without making necessary findings of fact and giving the legal basis for the dismissal.

3. The Lower Court erred when, after finding that defendants had not been properly served at the outset, as per defendants' limited "special appearances" and arguments made of no service, it then proceeded to rule on matters in disregard of this lack of jurisdiction finding as to defendants. Related, is the issue of whether a defendant who enters a "special appearance" to contest jurisdiction can then proceed to participate in the case in disregard of that limited special appearance.

4. The Lower Court erred in finding the assertions of the Complaint to be "designed merely for the purpose of harassing and causing expense and inconvenience" to defendants.

5. The Lower Court erred in finding all causes of actions to have been dispositively resolved, a finding based on argument of defendants, where in fact not one of the causes of action asserted has ever been heard on its merits.

6. The Lower Court erred in making conclusory personal accusations against plaintiffs that are incorrect at the outset, but also are made without any fact findings to support such remarks, in the case where no record was established through Discovery on which to support any such statements.

7. The Lower Court erred if it relied, assuming with speculation and *arguendo* as is necessary, on the Statute of Limitations as a basis for dismissal of the entire case, without making any of the necessary fact findings and without taking evidence on which to base any fact findings.

Errors In Initial Procedural Actions

Initial procedural actions taken by the USDC Norfolk and the USDC Richmond caused these cases to be wrongly lumped together as one. Several issues are presented from these procedural actions taken, and the result is not insignificant. In fact, by "packaging" the individual cases filed into one, and then adding the second case into it, on which service was never initiated on any defendant, the result is the broad brush approach of erroneously dismissing everything with prejudice. The following breaks down the procedural issues that arise from this:

8A The trial court erred in consolidating the seven cases filed in MAY 05, carved out and individually filed by plaintiffs as to particular defendants and particular blocks of time for easy handling at trial.

8B The USDC Norfolk trial court erred in prematurely sending the DEC 05 case to Richmond prior to the time plaintiffs had for making service of process.

8C The trial court (USDC Richmond) erred by consolidating the DEC 05 case in with the already consolidated seven cases filed in MAY 05

8D The USDC Richmond trial court erred in not transferring the case (both MAY 05 and DEC 05 cases) back to the USDC Norfolk after all USDC Richmond judges had recused themselves from the case.

8E The Richmond USDC erred in transferring all cases to the USDC in Alexandria, which in turn erred by assigned them to a substitute judge from New York State, after all Richmond USDC judges had recused themselves from the case due to conflicts, rather than returning the cases to the equally good venue of plaintiffs' choice which was in the USDC in Norfolk.

8F The trial court (order on appeal from USDC Alex) erred in dismissing the DEC 05 case with prejudice based on it being consolidated with others where no service of that case was ever initiated by plaintiffs.

Having given the above summary list, plaintiffs proceed in the following to present these issues and their facts and arguments in the Court's Informal Brief format.

Issue 1: WHETHER THE TRIAL COURT ERRED IN IMPOSING RULE 11 SANCTIONS, AND ERRED ALSO IN IMPOSING RULE 11 SANCTIONS IN THE AMOUNT OF APROX. $630,000 AGAINST PLAINTIFFS.

Answer: (a) The Trial Court erred in imposing Rule 11 sanctions against appellants where there was no signed filing of appellants found to be frivolous under Rule 11 standards.

(b) The Trial Court also erred in imposing Rule 11 sanctions against appellants in the amount of approximately $630,000 (assuming 63 defendants) where defendants "special appearances" contested service of process so to avoid jurisdiction of the Court, and where the specific defendants (as opposed to those listed in the Complaint) are not identified, the total amount is not stated in the Order, and the amount clearly violates the purpose and intent of Rule 11, and no finding was made as to plaintiffs' ability to repay. Based on the record and content of the Order, which is absent any of the necessary factual findings required under Rule 11, no amount is justified under Rule 11, much less the "personal-bankruptcy" imposition of over half a million dollars on *pro se* plaintiffs

Supporting Facts and Argument:

The trial court's order in very abbreviated language imposes Rule 11 sanctions against both plaintiffs "in the amount of $10,000 per named defendant". The order never addresses the specific defendants to be awarded the $10,000.00 and does not give a total for the sanctions it imposed, raising a question as to its awareness of the staggering amount of its action. Plus, all defendants did not even seek Rule 11 sanctions and notice under Rule 11 was insufficient and improper. This order leaves bankruptcy waiting in the wings for plaintiffs who simply sought, through court procedures, for accountability – their day in court – for the clearly willful killing, i.e. murder, of Dorothy Morrissey and related wrongs asserted against the defendants each of whom have major culpability for the injuries claimed over a 3+ period of years.

The order recites that "plaintiffs have flouted time and again" a bar as to cases against these defendants, Order, p.2, lns. 3-2 fm bottom, although no such bar is cited. Fact is that plaintiffs have never "flouted" any court order and defendants arguments on this, which the trial court adopted, and which are designed and intended to deny plaintiffs their right to pursue lawful remedies available to them. Plaintiffs have filed similar cases in the State courts, one voluntarily dismissed by non-suit and one dismissed for non-service. What defendants do not say (and so the trial court did not adopt) and is controlling is that this case had NEVER been heard on its merits. Some cases were not pursued, some dismissed on non-suit, on procedural matters and other grounds. But the case has never been heard on its merits, nor after any Discovery had been conducted because there has never been any Discovery in any State case. The State cases were not before the trial court. They were not a part of this case and it was error for the trial court to accept en mass arguments not going to the Complaints filed in the present consolidated case, but rather to cases not active and not before the trial court, that never had proceeded to Discovery and were never heard on the merits.

Nature of the Case. It is important to understand the nature of this case and some of the underlying conduct that gives rise to these actions. Thus a short digression into the Background and Nature of the Case is helpful.

The three-year period in which Mrs. Morrissey was wrongly controlled, effectively imprisoned with less rights than a convicted felon, and forced to suffer the most indescribable and inhumane pain, entailed conduct of defendants that spanned across boundaries (Richmond City and surrounding Counties), involved County and State agencies, went from individual "guardians" that abandoned Mrs. Morrissey and her family in disregard of their most

fundamental rights, up to government persons and agencies charged to prevent and guard against the very atrocities that were ruthlessly inflicted daily and continuously over three long years. It was the fear that Mrs. Morrissey would survive that led, in the end, to a concerted plan to kill her so to suppress the "evidence" that she would present were she to survive the indignities and injuries inflicted with impunity on her. Only by photographs of her body, taken hours after her death and reflecting images of the worst of third-world country butchering, was the Virginia State Medical Examiner able to review the case and arrive at a finding, which she expressed as: "Your mother did not die a natural death. She died an unnatural death. I'm turning this over to the Virginia State Police." Those photographs, blocked by certain defendants during Mrs. Morrissey's death-march, made the case along with the paper trail that had been amassed throughout this horrific and unprecedented type of captivity and death of a wholly innocent, widely-loved, and legally competent adult. Some time later the U.S. Attorney's Office became interested and reviewed the case, and their independent assessment led them to join in with this Virginia State Police so the matter became a joint State and Federal criminal investigation.

Therefore, the defendants' arguments, not evidence, to the trial judge using the familiar defense term of "frivolous", was not only insulting to the plaintiffs family but also flies in the face of the beaten-down and heartbreaking carcass, all that was left in the end. Given the close political association of this conduct with local State and County departments, and individuals closely aligned therewith, and the political barriers faced in the State forums, it is not at all unusual that plaintiffs filed their case in the USDC, and in the USDC in Norfolk, to remove it from the conflicts and past history that caused and perpetrated the wrongs that caused this indescribable injustice on such a peace-loving, religious and life-long citizen of this

community as was Mrs. Morrissey. She went to her death as a legally competent adult, the same as you and me. Yet, she had been forced into the captivity and isolation of a so-called "guardianship", severed from her family, from her church, from her home, her children and her friends...and them from her. All her property had been taken, in her absence, and her formal legal papers prepared by her attorney as a Durable Power of Attorney and an Advanced Medical Directive to her closest adult child, were all ignored. Mrs. Morrissey died "trapped", in this captivity, while others picked away at her finances for their own gain, and then acted to have her killed in the end while causing the family severance and destruction and conversion of plaintiffs' properties and possessions in the process.

This synopsis is significant for it shows that to seek justice by going through the court procedures is not only natural and proper, but is also a right from this family that still wails in the secrecy orchestrated by these defendants as to the cause and details of her death, as well as the details of her captivity. It is only good practice in the face of such a highly charged political environment in which defendants have shown a determination to do anything to keep the lid on this, that plaintiffs step back, and bring the case in the hopefully more detached, less politically influenced confines of the federal court system.

Furthermore, this case asserts uniquely federal statute violations, such as the Medicaid fraud that ran rampant throughout the three-year fight for Mrs. Morrissey's life. In-depth talks with the State's Attorney General's Office with evidence of this fraud was met with inaction and/or indifference, as was the case with many other similar cries to stop the insanity and return the family back into their home of 30+ years in the Richmond suburbs.

Thus this case was correctly brought in the federal court (not an issue) and the Complaints were what was before the trial judge; not prior non-suited or other cases filed in the State court, and it was wrong for the trial judge to impose any Rule 11 sanctions against both plaintiffs separately, and that wrong was exacerbated by the assessment of the staggering amount of aprox. $630,000 as sanctions, with no findings of fact and conclusions of law made by the trial judge as required to support the amount or even the action of any Rule 11 sanction under these facts. It is also revealing of further error on this to note the short reason given for this action, as referenced above. The trial court clearly is using Rule 11 in this instance to erect a financial wall, a financial barrier, against plaintiffs to block them from ever bringing this case again, although the legal support for such an intent – to deny plaintiffs their day in court on a case that has never been heard on its merits or even ever had Discovery – is legally lacking. The trial court's action goes well beyond that, for it extracts more, namely an immediate bankruptcy for both plaintiffs. Thus it is wrongly used as a tool for even more than the trial court itself says as its intent. Furthermore, if the trial court's intent was to block the case from ever being filed again, assuming *arguendo* it could legally support such a position, then all it had to do was enter an order to that effect.

Still further, the basis for any Rule 11 sanctions against plaintiffs is lacking here under the standards of that Rule. Plaintiffs missed the first scheduled court conference in the case, inadvertently and perhaps negligently on plaintiffs part, but not deliberately because plaintiffs had not seen, and did not know of, that hearing. It appears that in plaintiffs' absence, the trial court, based on the fact that other State cases had been filed although none went to trial or heard any evidence on the merits, assessed this magnitude of $630,000 against plaintiffs so that the case would not be filed again. The trial court was wrong in so doing, its action is unsupportable under Rule 11 and the disparaging personal

statements made in the order are unsupported. This now presents a heavy and looming personal bankruptcy prejudice to plaintiffs who have only sought their day in court for a most unconstitutional captivity and gruesome murder. The conduct complained of was equivalent to an atom bomb being dropped on this family, the ramifications from which are lived with daily, and the cover-up on the part of defendants is continuing and ongoing as to the causes of action asserted. The Rule 11 action of the trial court, as to both its imposition and the amount of that imposition, is error and justice requires that it be reversed.

The District Court abused its discretion in imposing Rule 11 sanctions not based on the signing of a pleading, motion, or other paper.

Rule 11 is limited in scope. It "does not authorize the imposition of sanctions for all actions taken in the course of litigation. It authorizes sanctions stemming from the signing of a pleading, motion or other paper which is not well-grounded in fact and warranted by existing law or which represents a good faith argument, measured by an objective standard, that existing law should be extended, modified or reversed." Introcaso v. Cunningham, 857 F.2d 965, 970 (4th Cir. 1988).

In this case, the court did not make any finding that a specific pleading was frivolous. In fact, it made no finding whatsoever as to the merits of any paper signed by the Plaintiffs. The only mention of any filing of the plaintiffs is the court's note that plaintiffs had "failed to file responses to [defendants'] dispositive motions." Order, 1. Even under the most creative interpretation of Rule 11, *failure* to sign and file a paper can not give rise to sanctions. There is no difference between the instant case and *Introcaso*, about which this court wrote: "Regrettably, the district court did not identify what

pleading, motion, or other paper, the signing of which and the proceedings stemming therefrom, it regarded as frivolous." Introcaso v. Cunningham, 857 F.2d at 970. Just at the Rule 11 sanctions were vacated in that case, they should be vacated here.

Having made no findings of a frivolous filing, the court based its decision to sanction plaintiff on a finding that "the conduct of the plaintiff in this matter is egregious, vexatious, and designed merely for the purpose of harassing and causing expense and inconvenience to the various defendants." Order, 2. Given the limited scope of Rule 11, this ruling is on its face impermissibly broad. No fact finding from a properly established record was made in the Order to support the jump to this most personal attach.

Broadness, however, is not the worst abuse of discretion in this Order. This court has specifically warned that a "district court must constantly bear in mind the limited purposes of Rule 11, particularly in a case... where a court may disagree with aspect of counsel's conduct which fall outside the scope of Rule 11." In re Kunstler, 914 F.2d 505, 524 (4th Cir. 1990). Rather than providing any examples of conduct that is within the scope of Rule 11, the Court offers a litany of actions that the plaintiff failed to take, and notes sanctions imposed, allegedly, on the Plaintiff by other courts (which is neither accurate nor complete). Order, 1-2. The inexorable conclusion is that the district court vindictively imposed this sanction in order to punish Plaintiff's conduct in general, rather than any signed filing that would be subject to Rule 11.

The district court further abused its discretion by failing to take in to account the plaintiff's ability to pay.

Assuming, *arguendo*, that the district court did not abuse its discretion by awarding sanctions, it did abuse that discretion in setting the amount of sanctions without taking into account the plaintiff's ability to pay.

This court has adopted a four-part test for determining an appropriate amount of Rule 11 sanctions. "A district court should consider...(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum amount necessary to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation." In re Kunstler, 914 F.2d at 523. In this case, it is clear that the court only minimally took into account the second factor, but even that is questionable, since there is no explanation as to how "$10,000" per defendant was this legally required minimum amount, totaling over half a million dollars. This is a bankruptcy amount, and goes far beyond the case by threatening lost of home, property and anything else of value build up from a lifetime of work. The operative part of the order itself makes it clear that the amount of sanctions was determined because it was "apparent that no previous sanctions have impressed upon the plaintiffs to the gravity of their misconduct in these matters." Order, 3 (without any cite provided to rebut). Plaintiffs object to this likewise as being untrue. The Order itself gives no details to support this strong conclusion that denigrates plaintiffs' respect for the courts as the place to bring these very most serious personal issues. It was an abuse of discretion to take into account only this the "minimum amount" factor with the short conclusory language of the Order, while ignoring the plaintiff's ability to pay and other two factors required under Rule 11.

In *Kunstler*, the court held specifically that "a monetary sanction imposed without any consideration of ability to pay would be an abuse of discretion." In re Kunstler, 914 F.2d at 524. It stated that "[w]hen the monetary sanction is large... the

parties should generally be given the opportunity to submit affidavits on their financial status, or to submit such other evidence as the court's discretion permits," *Id.;* and warns that "[a] court should refrain from imposing a monetary award so great that it will bankrupt the offending parties." *Id.*

In the instant case, the court made no finding of an ability to pay. In fact, it did not even calculate the total sum of the sanctions it imposed. The court imposed a sanction of $10,000 per named defendant. With 63 named defendants, this represents a sanction of $630,000.

This court has vacated Rule 11 sanctions in the amount of $21,156.24 and $122,834.28 at least partially on the grounds that the court failed to take into account the plaintiff's ability to pay. *Id.*; Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cit. 1991). Surely a sanction more than five times the size of the larger of these (and almost 30 times the smaller!) affords plaintiff the same right to demonstrate an inability to pay. The Rule 11 sanctions should be vacated based on the court's failure to take this in to account.

The opportunity for the trial court to correct this and other errors was presented at the post-order hearing on plaintiffs' Motion for Relief from Judgment, heard in Alexandria, Va. in July 2006 (a hearing called on less than 24 hour notice because the New York State judge would not be coming back to Virginia for some months). The trial court was unfamiliar with what plaintiffs' had filed prior to that hearing and failed to correct any of these points as it summarily affirmed with little comment.

Issue 2. WHETHER THE LOWER COURT ERRED IN DISMISSING THE CASE, AND ERRED FURTHER IN DOING SO WITH PREJUDICE, WITHOUT MAKING NECESSARY FINDINGS OF FACT AND GIVING THE LEGAL BASIS FOR THE DISMISSAL.

Supporting Facts and Argument.

The Lower Court erred in dismissing the case, and erred further in doing so with prejudice, without making necessary findings of fact and giving the legal basis for the dismissal. **The district court abused its discretion by dismissing this case with prejudice without reaching the merits of the claims.**

Before beginning a discussion of the district court's order of dismissal, it must be stated that court has made this job more difficult by the language of its order, which is vague, conclusory only without any reference to evidence, dates or other specifics, and is inflammatory. The court fails to note under which rule of civil procedure it is dismissing this case, or provide reasons for a dismissal with prejudice, as opposed to without prejudice, that might provide for legitimate judicial review. However, there are hints present in the order as to the court's motive, which plaintiffs submit is insufficient to support as a matter of law its most drastic action, and it is to these this response tries to address.

IF the dismissal is based on a statute of limitations (not stated), then the Order is clearly defective and must be reversed. [See also Issue #7, infra, on the S/L issue]. One conclusion the Order adds, at pg. 1, is that plaintiffs "failed to have filed the actions consolidated under this case number... within the appropriate statute of limitations." Order, 1. However, this is a complex action, comprising 10 or more distinct claims in the various cases (the problem with such a

huge consolidation) with differing statutes of limitations, some turning on factual questions of the existence of contract rights, property rights, continuing and ongoing actions, and all revolving around the question of law of when the statute of limitations begins to run for actions filed by an estate, something never addressed in the Order. The district court did not engage in even the most cursory discussion of the facts or law on this particular issue, and does not state it as the basis for dismissal. It appears that the dismissal is based more on the inflammatory and accusatory language of the Order, other outside cases not before the Court and without any specifics given, which are insufficient as a matter of law to support the trial court's action, especially where no evidence was received in Discovery to establish an evidentiary record. The inaccuracy and untruths of some of the Order's accusations (defendants' arguments) would be subject to correction through appropriate Court Discovery, but as it stands, can only be denied since no evidentiary documents were submitted to support the extreme action and personal attacks.

In the alternative, the court may have intended its order as a sanction of the plaintiffs' behavior. This Court (the Fourth Circuit) has recognized that this act of prejudicial dismissal is the most serious sanction available to a district court, and should be exercised with extreme caution particularly where it is allegedly based on a plaintiff's behavior, and when expressed in the broadest, generalized sense as exists here. Plaintiffs filed their Complaint, and the assertions of that document were not found to be in any way frivolous. Plaintiffs were unable to fully participate in the early part of 2006 due to unexpected medical complications and four surgeries that occurred. This was explained to the trial court in the post-Order hearing for Relief from the Order. But a non-response to defensive assertions does not constitute harassment or anything of that sort, and those defense assertions do not constitute evidence. As this Court has

stated, "Mindful of the strong policy that cases be decided on the merits, and that dismissal without deciding the merits is the most extreme sanction, a court must not only exercise its inherent power to dismiss with restraint, but it may do so only after considering several factors." United States v. Shaffer Equipment Co., 11 F.3d 450, 462 (4th Cir. 1993). The court in *Shaffer* continued by consolidating a six-part test, taken from prior case law that a district court must use in determining whether dismissal with prejudice is an appropriate sanction. "Thus, before exercising the inherent power to dismiss a case, a court must consider the following factors: (1) the degree of the wrongdoer's culpability; (2) the extend of the client's blameworthiness if the wrongful conduct is committed by its attorney...; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest. *Id.*

In this case, the court made no attempt to engage in this important balancing test. If it had, it would have concluded that all the relevant factors militate strongly against dismissal of this case with prejudice. First, the plaintiffs' inability to reply to all defendants' filings (some replies were filed) was due to extraordinary events largely out of plaintiffs' control and which they did not enjoy in the least. Other cases from other courts were not before the trial court, which seemed to be the main focus rather than the case that was before the trial court. Vague references to them for the purpose of denigrating plaintiffs are suspect, and plaintiffs state further that the Order's statements are misleading and incomplete and some blatantly not true. Rebuttal to these is made especially difficult where no documents or evidence is offered in support of the inflammatory tone of the Order. In short, there is insufficient support for the Order's finding that the matter "is

egregious, vexatious and designed merely for the purpose of harassing and causing expense and inconvenience to the various defendants." Order p.2. This is too familiar language from anyone sued on such serious causes of action. It defies common sense to think that plaintiffs themselves would incur the tremendous expense and inconvenience of bringing the cases just to cause the same on defendants. This has taken a far greater personal toll on the limited finances of these plaintiffs than on the insurance companies involved in this. This conclusion just makes no sense and no valid evidence exists for it.

Second, with reference to the analysis this Court requires in *Shaffer*, dismissal would prejudice the administration of justice by depriving the plaintiff of his day in court. Third, the prejudice to the "victim" consisted only of several large insurance companies having to appear in court to defend themselves – a normal occurrence in their line of work. This is the cost of business to all parties, plaintiffs alike, as the U.S. in general follows the "American Rule" where each party bears their respective expense, as opposed to the "English Rule". Finally, there is a public interest in allowing access to courts by *pro se* litigants, who by nature cannot enter appearances through their attorneys, such as when faced with unexpected and exigent circumstances. Although this may or may not entitle them to any special treatment by this Court, it should color this Court's interpretation of the facts of this case. Allowing the motion to dismiss with prejudice to stand will not only forever deprive the plaintiff of his rightful access to the court, which is most severe in itself. But in return for seeking accountability, and information as to causes of death which continue to be held in secrecy, through the proper judicial process for what the State of Virginia has concluded to be an "unnatural death", plaintiffs would be forced into bankruptcy, a factor specifically addressed by the courts on the issue. These defendants are named because of

their reckless conduct and liability, over a long 3-year period, so the number of defendants was not a matter of plaintiffs' control. It was a matter of the long ordeal throughout which the actions complained of occurred. The liabilities are not just for the wrongful taking of a life but for all its related incidents and impacts, including a complete family destruction and loss of the most valuable family personal properties, and other losses.

Failure of the trial court to consider these factors mandated in *Shaffer* and emphasized in other cases constitutes an abuse of discretion on the part of the district court, and the order to dismiss and to dismiss with prejudice should be vacated.

Issue 3. (a) WHETHER THE TRIAL COURT ERRED IN ACKNOWLEDGING NO PROOF OF SERVICE ON DEFENDANTS WAS FILED, WITH "SPECIAL APPEARANCES" ENTERED BY DEFENDANTS FOR THE LIMITED PURPOSE OF CONTESTING PROPER JURISDICTION OVER THEM; THEN PROCEEDING TO RULE ON MATTERS AS THOUGH SERVICE HAD BEEN MADE ON EACH DEFENDANT, THUS DISREGARDING (AND CHANGING) DEFENDANTS' OWN ARGUMENTS FOR THEIR "SPECIAL APPEARANCE" SO TO NOT BE SUBJECT TO THE COURT'S JURISDICTION. And the related issue of:

(b) WHETHER A DEFENDANT CAN ENTER A "SPECIAL APPEARANCE" FOR A LIMITED PURPOSE AND THEN LATER PARTICIPATE AS THOUGH IT HAD MADE A "GENERAL APPEARANCE".

Supporting Facts and Argument.

The Lower Court's order finds that the defendants were not timely served (all of them), and no proof of service was filed as to any defendant. Order, pg. 1 (lines 6 to 3 fm

bottom). This supports defendants' positions taken on the same point. Therefore they were not properly before the court and the court had no jurisdiction over them. The trial court had a duty in so finding, and consistent with defendants' arguments, to enter an order dismissing the case for lack of jurisdiction based on inadequate service of process. The law on this is clear. In such a case, any order as to them is a nullity and void *ob initio*.

Defendants cannot have it both ways. They cannot enter a special appearance for this purpose and then act as though it had never been done. In its Order, the Lower Court accepts defendants' arguments, and finds that the defendants (it lumps them all together in its finding) were not legally served. That being the finding, the Order being appealed from is void, and this Appellate Court should so find.

Issue 4. WHETHER THE LOWER COURT ERRED IN FINDING THE ASSERTIONS OF THE COMPLAINT TO BE "DESIGNED MERELY FOR THE PURPOSE OF HARASSING AND CAUSING EXPENSE AND INCONVENIENCE" TO DEFENDANTS.

Supporting Facts and Argument.

This issue has been addressed in the Facts and Argument section of Issue 2 and that information is incorporated herein by reference.

Issue 5. WHETHER THE LOWER COURT ERRED IN FINDING ALL CAUSES OF ACTIONS ALLEGED TO HAVE BEEN DISPOSITIVELY RESOLVED BASED ON ARGUMENT OF DEFENDANTS AND WHERE NOT ONE OF THE CAUSES OF ACTION ASSERTED HAS EVER BEEN HEARD ON ITS MERITS.

Supporting Facts and Argument.

The fact that no record has been established through Discovery to support this, the absence of evidence, and the Order's tone and content of conclusory and accusatory language absent support has already been addressed in the information provided on other issues, and that is incorporated herein by reference.

Issue 6. WHETHER THE LOWER COURT ERRED IN MAKING CONCLUSORY PERSONAL ACCUSATIONS AGAINST PLAINTIFFS THAT ARE INCORRECT AT THE OUTSET, BUT ALSO ARE MADE WITHOUT ANY FACT FINDINGS TO SUPPORT SUCH REMARKS, IN THE CASE WHERE NO RECORD WAS ESTABLISHED THROUGH DISCOVERY ON WHICH TO SUPPORT ANY SUCH STATEMENTS.

Supporting Facts and Argument.

Facts and argument on this have already been presented in other issues and are incorporated herein by reference. In particular however, plaintiffs take strong exception to the Order's "have flouted time and again" statement. Plaintiffs have never "flouted" any court order, and the trial court's such ready acceptance of defendants' argument is unfortunate and even reckless, for it is most personal. As a matter of law for purposes of review of the trial court's order, this "finding" is un-supported. The court's process must be guarded to prevent the memorializing of such personal attacks and the Order should be vacated for this additional reason.

7. WHETHER THE LOWER COURT ERRED IF IT RELIED, ASSUMING WITH SPECULATION AND *ARGUENDO* AS IS NECESSARY, ON THE STATUTE OF

LIMITATIONS AS A BASIS FOR DISMISSAL OF THE ENTIRE CASE, WITHOUT MAKING ANY OF THE NECESSARY FACT FINDINGS AND WITHOUT TAKING EVIDENCE ON WHICH TO BASE ANY FACT FINDINGS.

Supporting Facts and Argument.

Causes of Actions asserted were in fact timely filed. (Just a few brief examples here without adding to the length in addressing them all: All cases were filed within the 5-year S/L for damage to property, written contracts and continuing conduct of defendants in other areas). The trial court made none of the necessary finding of facts, did not consider applicability of the Virginia tolling provisions, did not address Estate case rules as to S/L and specifically failed to find from a record of properly adduced evidence, when the time starts and when it ends (or if it has ended). Such a sweeping conclusion as made is clearly unsupported for these reasons, but also, such a conclusive ruling is required to be made as to each defendant as well as to each claim asserted in the Complaint, none of which was done as is clearly shown in the Order. The sole reference to this issue is at pg.1, lines 7 to 6 fm bottom, where in the same sentence the trial court finds (and contradictory to a S/L dismissal) essentially that it has no jurisdiction over defendants because plaintiffs "failed to timely serve the defendants" (lns. 6-5 fm bottom, pg. 1).

However even addressing this is, as stated, speculation as to whether this is relied on or not because it is not cited in the dismissal language of the Order at pg. 3, top lines 1-2. Since however briefly this limitations issue is mentioned in recitations on the Order's page 1, plaintiffs still felt it necessary to point out the fatal defects of this finding.

Issues 8. Procedural Error As To Venue And Consolidation

Introductory Statement of the Case and Procedural Issues:

The following discussion might be confusing without a clear recitation of the cases files and how they were handled procedurally in ending up with one big, and plaintiffs suggest unmanageable, case, i.e., in trying to address each issue and causes of action as to each defendant to properly address with specificity the issues involved.

The record will show that plaintiffs filed seven separate cases on May 22, 2005 at the USDC Norfolk. These cases broke down the defendants and causes of action complained of into logical time slots and defendant conduct during certain periods of the full three-year ordeal wherein, plaintiffs have asserted and submit that irrefutable evidence will show, violations of the most extreme sort were made against both plaintiffs, starting with the wrongful confinement of a legally competent and innocent adult, Dorothy Morrissey, all against her will. The guardianship control was imposed over her even in her absence and total control over her person and property given to strangers designated as "guardians". These cases are referred to as plaintiffs' first filings.

A second case was filed on Dec 6, 2005, also in the USDC Norfolk, based on the same violations, in case service was not made for unforeseen reasons in the first case.

The first filings were transferred to the USDC in Richmond and consolidated as one case. All judges in the USDC Richmond recused themselves due to conflicts, as plaintiffs knew was the case, and hence the choice of the USDC Norfolk as a permissible venue. The law is well-established that endorses honoring a plaintiffs choice of venue in situations of competing equal but different venue courts.

The USDC Richmond, upon recusal of all its judges from the case, then sent the case for unknown reasons to the USDC Alexandria, instead of sending the case back to the USDC Norfolk, where it was originally filed. The USDC Alexandria then assigned the case out to a New York State judge who, plaintiff was told, came to Alexandria occasionally to hear cases. Just as plaintiffs were, the clerks in the USDC Richmond were confused on this as plaintiffs checked with the USDC Richmond court for hearing dates and were told that no dates were set and they had checked the case docket and confirmed this. Plaintiffs were told not to appear because the case is not on the docket. It was found out later that the USDC Alexandria did have the case on its docket. Richmond USDC did not have a record or copies of certain documents; but later it was found that USDC Alexandria did.

Meanwhile, plaintiffs later contacted the USDC Norfolk to initiate service of process in that case on defendants prior to the four months time period for service. They were told that the case had already been sent to USDC Richmond, on the court's own initiative, and it was subsequently found out that the second case had been merged in USDC Richmond (or in USDC Alexandria) into the 7 cases of plaintiffs' first filings which had already been merged into one. The result now was one jumbo case, with the time for making service in the second case cut short from what plaintiff was entitled to by the USDC Norfolk prematurely and *sui sponte* sending the case to USDC Richmond.

The result was one jumbo case with all the logical time periods, and defendants conduct, merged into what in reality was an almost undecipherable mess. The prejudicial impact on plaintiffs from this is best reflected in the Order being appealed where no specifics as to each defendant, or to each cause of action, or to individual timelines, are addressed. The whole case is lumped together as one as though none of these

differences exist. This caused grave prejudice to plaintiffs by the trial court's failure to address with specificity any of the important details with respect to any of the now approximately 63 defendants in the case. For this reason, a number of issues are presented in this appeal relating to this procedural handling of the case.

Issue 8A. WHETHER THE TRIAL COURT ERRED IN CONSOLIDATING THE SEVEN CASES FILED IN MAY 05, CARVED OUT AND INDIVIDUALLY FILED BY PLAINTIFFS AS TO PARTICULAR DEFENDANTS AND PARTICULAR BLOCKS OF TIME FOR EASY HANDLING AT TRIAL.

Answer: THE TRIAL COURT DID ERR BECAUSE THE RESULT WAS ONE MASSIVE SINGLE CASE, NOW WITH MANY DEFENDANTS AND MULTIPLE CAUSES OF ACTIONS WITH SEPARATE OR OVERLAPPING TIME PERIODS. ASSESSING THE MERITS AS TO EACH DEFENDANT AND EACH CAUSE OF ACTION BECAME EXTREMELY DIFFICULT. IT WAS OBVIOUSLY NEVER DONE IN THE TRIAL COURT'S ORDER AND THIS IS PROOF OF THE PREJUDICE TO PLAINTIFFS IN NOT GETTING THE INDIVIDUAL ASSESSMENT OF ISSUES PER DEFENDANT AS REQUIRED.

Supporting Facts and Argument.

On a defendant's motion to consolidate, the court has an independent duty to analyze the cases with an eye to the appropriateness of making such a consolidation and whether it furthers the interests of justice, and not just the interest of expediency. This is so even if a motion to consolidate is made by all defendants for tactical reasons with no opposition filed. The independent duty remains with the Court to make a

determination as to appropriateness of any consolidation with attention and balance given to the likelihood of prejudice it might cause.

The fact that there is simply a common plaintiff is not determinative. In this case, there were different named defendants in each of the seven cases. The trial judge failed to make this independent analysis. There is no such analysis, assessment or even a reasoning as to why the merger was granted. This severely prejudiced plaintiffs because, when their delay was encountered due to outside circumstances in the first part of 2006 to be able to reply to all motions of all defendants in this now one humongous case, plaintiffs were unable to fully respond in any one case because all cases carried the huge volume of a single jumbo case in the midst of four medical surgeries and un-expectancies plaintiff faced the early part of 2006. (This explanation presented to the trial court in the post-Order hearing on plaintiffs' Motion for Relief to confirm the inability to respond in those months was not deliberate and unintended. Plaintiff felt fortunate to be able to still be around for that hearing).

It was clearly not in the interests of justice to consolidate all the cases. Maybe for expediency in getting it off the docket and for defendants, but not for justice or to avoid the procedural nightmare of prejudice that resulted. Plaintiffs' filing of them as separate cases should have been honored because of the logical, easier-to-follow events tagged as to the different conduct of individual defendants and for certain time periods.

At the last post-order hearing on plaintiffs' Motion for Relief From Judgment the prejudicial results of this merging together of all the individual cases were glaring as defendants made the most generalized arguments, with little specificity as to each individual defendant. The trial court followed in kind,

in ruling to dismiss without any comment, questions or findings made as to each cause of action and as to any specific defendant, much less as to each of them as is required.

In short, the wrongful consolidation ended up with all defendants grouped as one as though they were all on equal footing as to affirmative defenses, causes of action and liability. But they are not and such uniformity applied to it all missed the legal reasoning to apply to specifics. What followed were generalized defensive arguments designed to get the whole group off the hook. This severely prejudiced plaintiffs because the result was, as evidenced by the Order being appealed, a failure by the Court to address any affirmative defense, each cause of action, and individual conduct as to each defendant. The trial court wrongly lumped all defendants together, as though one common denominator, disregarding the differing roles and actions asserted as to each of the 63 defendants. This consolidation of the cases into one, without making the required justification, constitutes reversible error for it gravely prejudiced plaintiffs as is most evident from the broad brush approach of the final Order being appealed.

Issue 8B. WHETHER THE USDC NORFOLK TRIAL COURT ERRED IN PREMATURELY SENDING THE DEC 05 CASE TO RICHMOND PRIOR TO THE TIME PLAINTIFFS HAD FOR MAKING SERVICE OF PROCESS.

Supporting Facts and Argument.

It is up to a plaintiff, once it has filed a case, to decide when to initiate service of process on defendants. Under the USDC rules, a four month time period, at the least, is given for doing this, and that time period can be extended upon motion and a granting court order. It is error for the Court,

on its own, to step in and cut short a plaintiff's rightful time period for acting in this regard, which is exactly what the Norfolk USDC did. As a consequence in the circumstances of this case, which plaintiffs planned to guard against by making this second filing, plaintiffs were severely prejudiced because they loss the right to non-suit the first set of cases and proceed solely with the second. The serious medical and other problems, all occurring when plaintiffs were required to be far out-of-State for the first part of 2006, severely impacted on their ability to reply to defense motions promptly in early 2006. This second back-up case would have solved that problem by being able to non-suit the first set of cases, now merged as one, and proceeding with the second case. The unilateral action of the USDC severely prejudiced plaintiffs in this regard and constitutes reversible error.

Issue 8C WHETHER THE TRIAL COURT (USDC RICHMOND) ERRED BY CONSOLIDATING THE DEC 05 CASE IN WITH THE ALREADY CONSOLIDATED SEVEN CASES FILED IN MAY 05.

Supporting Facts and Argument.

The prejudicial effect of this has already been discussed in other facts and argument sections on the wrongful consolidation issue and its impacts, and those are incorporated herein by reference.

Issue 8D. WHETHER THE USDC RICHMOND TRIAL COURT ERRED IN NOT TRANSFERRING THE CASE (BOTH MAY 05 AND DEC 05 CASES) BACK TO USDC NORFOLK AFTER ALL USDC RICHMOND JUDGES RECUSED THEMSELVES FROM THE CASE.

Supporting Facts and Argument.

Plaintiffs have been told that upon receipt of the DEC 05 case from the USDC Norfolk, it was consolidated in the USDC Richmond with the already-once-consolidated MAY 05 case. Thus what plaintiffs had filed as seven cases at one time followed months later with a single case were now all merged into one and being handled procedural on the procedural track of the merged, first set of filed cases. Thus plaintiffs, even though they had not directed that the December 6, 2005 case be transferred to Richmond, and no defendants had been served so no defendants had asked for any action in that case either, the Norfolk USDC on its own acted to move the case out of its court. Thus the benefit plaintiffs rightfully had to delay service for at least four months was negated. Furthermore, no service of process in the December 6, 2005 case had been initiated by plaintiffs and no service made on any defendants. Yet, in the trial court's Order now being appealed, the case plaintiffs had filed on December 6, 2005 and taken no further action other than trying to initiate service, was dismissed in its entirety. This constitutes reversible error as to the DEC 05 case.

Issue 8E. WHETHER THE RICHMOND USDC ERRED IN TRANSFERRING ALL CASES TO THE USDC IN ALEXANDRIA, WHICH IN TURN ERRED BY ASSIGNED THEM TO A SUBSTITUTE JUDGE FROM NEW YORK, AFTER ALL RICHMOND USDC JUDGES HAD RECUSED THEMSELVES FROM THE CASE DUE TO CONFLICTS, RATHER THAN RETURNING THE CASES TO THE EQUALLY GOOD VENUE OF PLAINTIFFS' CHOICE WHICH WAS IN THE USDC IN NORFOLK.

Supporting Facts and Argument.

The well-established rule on venue is that a plaintiff's choice of venue is to be given priority and prevail when there becomes a dispute as to two or more equally-suitable places of venue. If court A and court B are on equal footing as to venue in that they are both acceptable venues, then plaintiff, as the initiating party, is to prevail as to its choice of venue in filing the case.

Once the Richmond USDC judges recused themselves so the case could not be heard in Richmond, which plaintiffs correctly assumed would occur, the cases should have been remanded back to the Norfolk USDC where there were no such conflicts and where the cases had been originally filed. This would have also avoided the confusion that arose in this case, namely, in that the Richmond court, which had a case manager assigned to the case, did not have a record of any hearing called in the case and initially told plaintiffs they did not have to appear because the case was not on the docket. Plaintiffs' persistence, given the cryptic letter just received hours earlier from one of the defendants simply asking for a hearing the next day (less than 24-hours away), finally resulted in the clerk's office in Richmond finding that the case was listed on the Alexandria USDC docket. But another problem then arose in that no order had been entered, in either court, and the purpose of the hearing was therefore unknown, although the clerk's office advised that it was for a status conference. A third problem then arose in that neither the presiding judge nor his law clerk could be contacted because they were in New York and best information was that they were in travel and unreachable.

Had the cases been properly remanded to the Norfolk USDC as the venue rules require, all this could have been avoided, and it is probable that an order or Hearing Notice would have been entered, as is ordinarily the way a hearing is scheduled, and its purpose known before walking into a hearing, as was done on August 16, 2006 when the purpose of that hearing

was never written down in advance, and no notice of the reason for the hearing was given on a 1-day "notice" received from an opposing party, not even from the Court. Thus for plaintiffs there was no advance notice given so to allow preparation for what to expect, although it was learned later that the judge had telephone a defense counsel on this which prompted that defense counsel to hand deliver with less than 24-hours notice a statement that he was "asking" for a hearing. The USDC Richmond clerks did not even have any information on this in their system.

Thus, the failure to remand the cases back to the Norfolk USDC as per the rules, and instead the sending of the cases to Alexandria and their assignment to a New York judge, severely prejudiced plaintiffs and constitutes reversible error.

Issue 8F WHETHER THE TRIAL COURT (ORDER ON APPEAL FROM USDC ALEX) ERRED IN DISMISSING THE DEC 05 CASE WITH PREJUDICE BASED ON IT BEING CONSOLIDATED WITH OTHERS AND WHERE NO SERVICE OF THAT CASE WAS EVER INITIATED BY PLAINTIFFS.

Supporting Facts and Argument.

This has been addressed in Issue 8D which is incorporated by reference. In review, the Lower Court erred in dismissing the second case since the time appellants rightfully had for making service of process had been cut short by the USDC Court on its own. Since plaintiffs neither initiated any, nor made any, service of process on defendants in the second case, the court's jurisdiction was never invoked as to that case and those defendants and that case should not have been dismissed.

Since plaintiffs had the right to make service in the second case on defendants at a later date, and that right was frustrated by the Norfolk USDC transferring the case on its own initiative to Richmond, and the Richmond court then transferring the case to the USDC Alexandria which assigned it to a New York judge who first merged it into the same docket of the first case and then dismissed it, that second case should be remanded and sent back to the Norfolk USDC to allow plaintiffs to commence service on defendants and the case proceed in the normal manner.

In summary, it seems strange that cases properly filed in the USDC Norfolk, knowing of the conflicts existing in the USDC Richmond, ends up in the USDC Alexandria, everything consolidated without any reasoning offered, one case acted on prematurely to plaintiffs' detriment, and then it is assigned to a New York State judge who "occasionally" comes to Virginia. In addition to concerns of a New York judge applying Virginia law in a complex case, this also led to uncertainties even in the USDC Richmond clerk's office as to the docket and any hearing being scheduled. The prejudice to plaintiffs has been addressed and for this reason too, the Order should be Vacated and Remanded back to the USDC Norfolk.

4. Relief requested

Appellants ask this Court to reverse and remand this case. The Remand would seem to be most appropriate back to the USDC Norfolk court. To vacate the Order as to Rule 11 sanctions, both as to it being improperly assessed and being improperly excessive; and to vacate the Order as to the case being dismissed with prejudice based on a lack of clarity in giving the legal basis for that action, and for the inability to legally reach that conclusion without making a reasoned finding of facts, as to each defendant and as to each cause of action.

Alternatively, appellants ask this Court to vacate the Lower Court's Order as entered without jurisdiction over all defendants, per this finding in the trial court's order. This Court should find that defendants are now estopped from asserting to the contrary what they urged the trial court at the start. They cannot have it both ways, and without proper service as argued and found, there is no jurisdiction and any subsequent order as to defendants is a nullity.

The above discussion of the issues supports the clear error in both the Rule 11 sanctions imposed of over half a million dollars, the error in a failure of the Order to make findings to support dismissal and in fact a failure to state the legal basis for the dismissal, and further clear error on the other issues presented. In this most important case of Wrongful Death and other related Federal and State causes of action, the well-established preference to have cases heard on their merits adds another layer of consideration favorable to granting the relief requested, especially here where no Discovery was ever conducted and the lower court's action largely rests on argument of defense counsel.

The causes of action asserted have never been heard on their merits, the Order contains reversible error both in the dismissal and in the costs imposed, and no Record was ever established through Discovery on which to base any fact findings. The procedural errors in bundling the separate cases into one, and then giving a broad brush treatment to this "one" case, as though it had only "one" defendant, is clearly wrong.

Therefore appellants pray that this Court further the ends of justice and reverse these erroneous actions below by vacating the Order and remanding the case back to the U.S. District Court. Or alternatively, find that defendants are

estopped from trying to benefit from an order after taking the position that legal service on them was lacking.

5. Prior Appeals

A. Plaintiffs have filed other appeals in this Court.

B. Dorothy L. Morrissey, in 99-1230 and 98-1936. This was during the 3-year of her unlawful confinement and control by strangers and the conversion of her property under the name of a "guardianship" imposed where she was not allowed to be present, nor was her Power of Attorney. At that "hearing", her formal legal POA and Advanced Medical Directive papers prepared earlier by her attorney were disregarded. It was this confinement away from her home and family that led to her prolonged suffering and death. The review that followed by the State Medical Examiner, who found that Mrs. Morrissey's death "was not a natural death, but an unnatural death", prompted the Joint Task Force of the Va. State Police and the U.S. Attorney's Office to open a criminal investigation into her death and all surrounding incidents of it -- sharp contradiction to any notion of the underlying civil action being frivolous.

Michael J. Morrissey in 98-2829 (Jackson v. Mathews), 98-1936 (Jackson v. Jackson), 98-1550 and 98-1316 (both Morrissey v. Jackson), all being related to Dorothy Morrissey's guardianship with a Greer Jackson and an Arthur Mathews being guardians that forced the confinement and resulting physical & medical problems to Mrs. Morrissey. Morrissey v Kelly in 97-1784, -1843, and -2005 being from 3-parts of one administrative agency case.

As can be seen, most of these prior appeals dealt with appealing actions which continued the wrongful

"Guardianship" over Dorothy Morrissey, in a most tragic manner of forced confinement and isolation from a County court (Henrico County) that wrongly imposed this guardianship control of strangers over Mrs. Morrissey, severed her family and inflicted a most gruesome and painful slow death on her. None of the appeals were successful. Now we have the fate accompli, and are back before this Court on that Wrongful Death, which represents the ultimate personal and family injury due to disregard back then by these very defendants of the "strict scrutiny" standards of the most basic fundamental rights (family, personal freedom, property rights). This outcome was clear in its coming, which the other appeals tried to prevent.

Conclusion: These defendants, while quick now to go through histrionics before the Court using the so-familiar defense language of "harassment" and "frivolous", were not so quick to curtail their conduct that inflicted the most extreme and illegal treatment over three long years. One plaintiff paid for it with her innocent life; the other plaintiff continues to pay for it for the rest of his life. Defendants' conduct in this case, in trying to keep the lid on the real underlying facts by avoiding Discovery, should be transparent to this Court. Now accountability comes knocking at defendants' doors through the Court process. These defendants, after already being responsible for various aspects of a long 3-year ordeal of torture, family severance and death, should not be allowed to escape this accountability. The Court process is the only vehicle available for seeing that rightfully through to its conclusion based on facts properly established on the record.....and not from purely argument of pretentious outrage from counsel. This Court is the sole guardian of this process and in law and in equity, the tactics of the defense insurance bar should be seen through by this Court. This case, on remand, should be allowed to proceed to normal Discovery or

arguments backed by the record, and not by name-calling and personal attacks to kill the messenger so to avoid the message.

HAVING FULLY ANSWERED WITH THE BREVITY DESIRED IN THE FORMAT OF THIS COURT'S INFORMAL BRIEF, APPELLANTS RESPECTFULLY PRAY THAT FOR THE REASONS STATED,
(1) THE LOWER COURT'S ORDER BE VACATED AND THIS CASE BE REMANDED BACK TO THE LOWER COURT IN THE USDC NORFOLK; OR ALTERNATIVELY,
(2) THAT THE ORDER BE DEEMED VOID ON ITS OWN FINDING OF A LACK OF PROPER SERVICE, AS PER DEFENDANTS' ARGUMENT AT THE OUTSET, AND HENCE LACK OF JURISDICTION.

Respectfully submitted,

ESTATE OF DOROTHY L. MORRISSEY
By:_____

and

_____
Michael J. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that I did mail on this 20th day of September 2006, postage prepaid, a copy of the foregoing Appellants' Informal Brief to the following counsel of record:

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In the Supreme Court of the United States

ESTATE OF DOROTHY L. MORRISSEY

AND

MICHAEL J. MORRISSEY,

Petitioners,

v.

ROBERT LESNIAK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

ESTATE OF DOROTHY L. MORRISSEY
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AND
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QUESTIONS PRESENTED ON REHEARING

I. Whether a trial court that does not have personal jurisdiction over defendants due to none of the defendants having been served with process, is able to lawfully proceed to act in imposing Rule 11 sanctions in favor of the defendants, and to act on other substantive matters in dismissing the case, absent personal jurisdiction over the defendants?

II. Whether Rule 11 sanctions are lawfully imposed when the trial court only summarily lists an amount as sanctions under Rule 11 without addressing any other issues required under the Rule 11 statute.

III. Whether a trial court order is a Final order subject to appeal when the order does not address or reference all cases that are involved in the case in which the trial court's order is entered.

PARTIES

All parties to this action are listed in the caption of the case in the Court of Appeals' opinion, at Appendix A, page 1a of the Petition for Writ of Certiorari. Petitioner on Rehearing files this in his own name only, as a party to the case. Petitioner does not file on behalf of the Estate nor as the Administrator of the Estate.

CORPORATE DISCLOSURE

There are no corporate issues in this case.

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STATEMENT OF RELATED CASES

Petitioner adopts its Statement of Related Cases as previous filed at page 1 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

OPINIONS BELOW

Petitioner adopts its Opinions Below as previous filed at page 1 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

JURISDICTION AND AUTHORITY

Petitioner adopts its Jurisdiction And Authority as previous filed at page 1 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

STATEMENT OF THE CASE

Petitioner adopts its Statement of the Case as previous filed at pages 2-3 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

STATEMENT OF THE ISSUES

In this Petition for Rehearing, petitioner asserts as issues on Rehearing:

1. That the Order in the District Court is void *ab initio* due to lack of jurisdiction based on the District Court's finding recited in its Order that none of the defendants were served with process.

2. That the Order of the District Court is not a final order because it does not address other cases that present differing facts/causes of action that were to be heard together with the case in which the District Court's Order was entered, leaving issues in the case still not ruled on and pending before the District Court.

3. That the District Court committed reversible error in summarily imposing over a million dollars as Rule 11 sanctions, with over half a million dollars being imposed against each of the plaintiffs, which is clearly excessive under Rule 11, and in failing to apply and address the other safeguards and procedural requirements that are mandated under the Rule 11 statute and its case law.

These three issues are listed at pages 3-6 in Petitioner's Petition for Writ of Certiorari as items number 1 (lack of jurisdiction, at page 3 and discussed at paragraph V. at pages 16-17); number 2 (not a final order, at page 4), and number 4 (excessive and non-compliant Rule 11 sanctions imposed, at pages 5-6 and discussed at paragraph II at pages 11-12, and at paragraph IV at pages 13-16).

STATEMENT OF THE FACTS

Petitioner adopts its Statement of the Facts as previous filed at pages 6-7 of its Petition for Writ of Certiorari, and incorporates same herein by reference.

REASONS ON RECONSIDERATION FOR GRANTING THE WRIT

I. THE DISTRICT COURT DID NOT HAVE PERSONAL JURISDICTION OVER ANY DEFENDANT IN THE CASE PER ITS ORDER AND THUS COMMITTED REVERSIBLE ERROR IN IMPOSING RULE 11 SANCTIONS IN FAVOR OF THE DEFENDANTS WHO WERE NOT BEFORE THE COURT.

Petitioner brings the following recent cases to the Court's attention as support for its position that the District Court did not have personal jurisdiction over any defendant, since no defendant was served with process (finding of the District Court's Order). The case should, at that point, have been dismissed for lack of jurisdiction, and the District Court's failure to do so constitutes reversible error. It also nullifies the District Court's actions thereafter that went on to dismiss the case on a statute of limitations basis without any evidentiary record established, and imposing Rule 11 sanctions in favor of defendants that had never been served and were therefore not subject to the Court's jurisdiction.

NO PERSONAL SERVICE, NO PERSONAL JURISDICTION, NO SANCTIONS.

- *Maryland Nat. Bank v. M/V Tanicorp I*, 796 F.Supp. 188 (D.Md.1992).

In this case, both Plaintiff and Defendant made motions for sanctions against one another under Rule 11. According to Plaintiff, Defendant Weisman

submitted numerous documents without legal or factual basis asserting that the Court did not have ***in personam jurisdiction*** over him. While the Court is sympathetic to Plaintiff's arguments for Rule 11 sanctions, this Court does not believe, however, that Defendants' conduct and pleadings are sufficiently not well enough grounded in either fact or law to justify the Court's granting of sanctions against the Defendant. Therefore, both Motions for Rule 11 Sanctions are denied.

- *Byrnes v. Jetnet Corp.* 111 F.R.D. 68 (M.D.N.C.1986)

Held: That without personal jurisdiction over Macfield, the Nebraska court would be unable to impose sanctions against it. 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2287 (1970).

- *Additive Controls & Measurement Systems, Inc. v. Flowdata*, Inc. 96 F.3d 1390 (C.A.Fed. Tex. 1996) (citing *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir.1930)).

In this case the court stated that Judge Learned Hand made the same point earlier in a patent infringement case similar in some respects to this one. In *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir.1930), the district court entered an injunctive decree against one defendant. The plaintiff then sought and obtained contempt sanctions against Joseph Staff, a former employee of the defendant, who had been dismissed as a party to the original case before the entry of the injunction. The plaintiff argued that the injunction should be construed as applying by

its terms to Staff, but the court of appeals rejected that argument and reversed. The court held that **the district court was not authorized to issue an injunction against Staff, since he was not a party to the underlying action.** The court explained:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. **It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.**

(emphasis added).

- *Brown v. PRC, Inc.* 91 F.3d 129 (C.A.4 Va. 1996).

In this case, appellants' notice of appeal was filed before the court's amended order granting Davis's and Johnson's Rule 59(e) motion and before the district court's disposition of appellants' Rule 60(b) motion and is thus "ineffective to appeal from the judgment or order." Appellants failed to amend their original notice of appeal or to file a new notice of appeal as is plainly required by Rule 4(a)(4) **in order to appeal the district court's amended order imposing Rule 11 sanctions. Accordingly, we lack jurisdiction to review the district court's March 24 Amended**

Order and dismiss this appeal for want of jurisdiction. (emphasis added).

- *Nationwide Mut. Ins. Co. v. Burke* 897 F.2d 734 (C.A.4 W.Va.1990).

The appellant Court considered Nationwide's argument that the district court erred in refusing to impose Rule 11 or contempt sanctions against the Hamiltons' attorney for his conduct in seeking state court enforcement of the settlement agreement. The contention is that the enforcement motion in state court had no legal or factual foundation, so that **the district court should have imposed Rule 11 sanctions under its retained jurisdiction.** *See* J.A. at 47 (citing *Langham-Hill Petroleum Inc. v. Southern Fuels, Co.*, 813 F.2d 1327, 1330-31 (4th Cir.1987) (district court may impose sanctions even after judgment is entered)). This contention is without merit-for a very simple reason. The motion to enforce the settlement agreement was filed in state court, and in no way constituted a "pleading, motion, or other paper ... signed in violation of" federal Rule 11. **"Rule 11 proceedings were never intended to resolve disputes between parties ... [or] to determine misrepresentation questions where the misrepresentation is not reflected in a pleading, motion or paper filed with the district court." *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir.1987). Accordingly, the district court's dismissal of Nationwide's motion to impose Rule 11 sanctions was proper.** (emphasis added).

Petitioner calls the Court's attention to the fact that the only pleading petitioner signed in this case

was the initial Complaint. As to it, no Discovery or evidence of any kind had been taken, and hence the assertions made therein are, under the law, assumed to be true at this point. In fact, the assertions on the merits of the causes of action in the Complaint were not addressed by the District Court.

The U.S. Supreme Court in Case No. 02-1606, styled *Tennessee Student Assistance Corporation, Petitioner vs. Pamela L. Hood*, on a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, held that an "adversary proceeding" requires the service of a summons and a complaint. (First paragraph, under section III of the Decision.) It follows then that without the service of a summons and complaint, there is no adversary proceeding, i.e. the court has no personal jurisdiction over the defendants.

Although the case is directed to a Tennessee statute concerning student loans and concerned a Bankruptcy proceeding, the principle requiring the service of a summons and a complaint for an adversary proceeding reflects the same well-established rule that applies to the present civil case.

In the present case, the trial court's order clearly states that no defendant was served with process. It therefore follows that the court had no personal jurisdiction over any defendant and its rulings that nonetheless followed are null and void for lack of jurisdiction, per the trial court's own finding of no service, i.e. no jurisdiction, as set forth in its order.

II. THE DISTRICT COURT COMMITTED REVERSIBLE IN IMPOSING RULE 11 SANCTIONS WITHOUT COMPLYING WITH THE CONDITIONS PRECEDENT TO MAKING SUCH AN ASSESSMENT, AND FURTHER COMMITTED REVERSIBLE ERROR IN IMPOSING SANCTIONS THAT ARE CLEARLY EXCESSIVE.

Petitioner brings the following recent cases to the Court's attention as support for its position that the District Court's summary action as regards the imposition of Rule 11 sanctions is unwarranted, unsupported by any evidence of Record, is gravely excessive and violates the Rule 11 standards in not applying the consideration factors and conditions of Rule 11.

(1) OFFENDER'S ABILITY TO PAY AS FACTOR IN OVERTURNING SANCTION:

- *Salvin v. American Nat. Ins. Co.*, Slip Copy, 2007 WL 1097891 (E.D.Va. 2007)

Held: The court is required to take into account the ability of the sanctioned party to pay. *See, e.g., Byrd v. Hopson*, 108 Fed. Appx. 749, 756 (4th Cir.2004) (unpublished) (citing *In re Kunstler*, 914 F.2d 505, 523 (4th Cir.1990)). Although *Kunstler* addressed sanctions under Rule 11, it noted that "[t]he offender's ability to pay must also be considered, not because it affects the egregiousness of the violation, but because the purpose of monetary sanctions is to deter attorney ... misconduct." *Kunstler*, 914 F.2d at 524. *See also Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.*, 886 F.2d

1485, 1496 (7th Cir. 1989) (noting that a court may take into account ability to pay in a *section 1927* claim).

(2) DENIAL OF RULE 11 SANCTIONS BY 4TH CIRCUIT:

*** Offender's ability to pay amount of sanctions

- *** *Leach v. Smith*, Slip Copy, 2007 WL 2155742 (E.D.Va. 2007)(discusses offender's ability to pay)

- *** *Bowers v. Rector and Visitors of University of Va.*, Slip Copy, 2007 WL 2963818 (W.D.Va. 2007)(discusses offender's ability to pay)

- *Scinto v. Preston*, Slip Copy, 2007 WL 1847289 (E.D.N.C. 2007)

- *Hospira, Inc. v. Alpha and Omega Transp. Services, Inc.*, Slip Copy, 2007 WL 1825182 (W.D.N.C. 2007)

- *Wallace v. Mercantile County Bank*, — F.Supp.2d—, 2007 WL 2572434 (D.Md. 2007)

- *Contech Stormwater Solutions v. Baysaver Technologies, Inc.* Slip Copy, 2007 WL 2872074 (D.Md. 2007)

- *Commonwealth Group-Winchester Partners, L.P. v. Winchester Warehousing, Inc.*, Slip Copy, 2007 WL 2570218 (W.D.Va. 2007)

- *Wadley v. Park at Landmark, LP*, Slip Copy, 2007 WL 1472211 (E.D.Va. 2007)

- *Segen v. Buchanan General Hosp., Inc.*, Slip Copy, 2007 WL 1094403 (W.D.Va. 2007)

(3) RULE 11 SANCTIONS OVERTURNED ON APPEAL:

- *Morris v. Wachovia Securities, Inc.*, Slip Copy, 2007 WL 2126344 (E.D.Va. 2007)

In this case, of 11 separate possible sanctions, one was deemed unwarranted based on the legal theory it was tied to. Court assessed attorney Schulman's amenability to sanctions under Rule 11(c) and disagreed w/ Wachovia's argument that Schulman should be sanctioned on the theory **that he abdicated his responsibilities as lead counsel.** "In fact, Schulman devoted only approximately ten billable hours to this case and, he says, that he devoted an additional twenty to thirty hours that were not billed. It is doubtful that the work performed by Schulman as lead counsel was adequate to satisfy the responsibilities of lead counsel, but whether the responsibilities of lead counsel were satisfied **is not the proper measure of whether sanctions should be imposed.** Wachovia has cited no authority which would support such an application of Rule 11(b) or (c)."

(4) In the recent case of *Irina Alexandrovna Johnson, petitioner, Appellant vs. Bryan Craig Johnson, Respondent*, filed January 30, 2007 in case no. A06-977, the Minnesota State Court of Appeals reviewed and Reversed the lower court's application of a Minnesota statute which tracks that of the FRCP's Rule 11. The Appellate Court held that the purpose of awarding attorney fees under the Minnesota statute

and its rule of civil procedure rule 11 is deterrence rather than punishment, the "safe-harbor" provision of the statute and rule is mandatory in requiring adequate notice of the possibility of a sanction *before filing* the motion with the court. It reversed the Rule 11 assessment, stating: "By failing to apply the mandatory "safe-harbor" provision, the district court erred as a matter of law." (Taken from last sentence near the end of the decision, before the concluding DECISION paragraph.)

While the case concerned a Minnesota statute, that statute like that of many if not most other States, tracks the provisions of the Federal Rule 11 of the Federal Rules of Civil Procedure (FRCP).

In the present case, the trial court made no finding as to any of the required checklist items of Rule 11 that are mandatory prior to any Rule 11 costs being imposed, including, although not limited to, this safe-harbor provision. Other factors mandated to be addressed under Rule 11 include (1) the party's financial ability and status, and (2) a required explanation as to the basis for imposing any Rule 11 sanctions and a reasoned decision as for the amount imposed. None of this was done in the present case.

III. THE DISTRICT COURT DID NOT ENTER AN APPEALABLE FINAL ORDER BECAUSE CASES THAT WERE BEFORE THE COURT TO BE DECIDED WITH THE PRESENT CASE IN WHICH THE ORDER WAS ENTERED WERE NEVER REFERENCED, ADDRESSED OR DECIDED IN THE DISTRICT COURT'S ORDER.

(1) An Illinois State Court decision, posted on September 19, 2007, in the case of *In re Reiny S.*, No. 1-06-2155 (6/29/07) addressed on appeal the issue of whether the appealed order was Final as disposing of all issues with finality. Although the case dealt with a parental unfitness issue and termination of parental rights to private guardianship, on the petition for rehearing the State's Appellate Court held that a permanency goal (an order changing parental rights to private guardianship) is a non-final order because it is not a final determination of all issues on the merits. Even though the case deals with a specific State statute on parental rights and guardianship, the principle is the same.

In the present case, other cases were to be heard by the same court. Yet, the court in its order never mentions, references, lists or rules as to the other cases. Therefore, the order of the District Court that is the subject of this Petition for Rehearing is not final and the matter should have been remanded back to the District Court for disposition of the cases that still remain to be considered that are not addressed in, nor covered by, the District Court's order.

(2) The Wisconsin Supreme Court issued two decisions on March 21, 2007 that addressed the issue of when an order for purposes of appeal is "final". In *Wambolt v. West Bend Mutual Ins. Co.*, No. 2005AP1874, and in *Tyler v. The RiverBank*, No. 2005AP2336, the Court held that an Order, to be final, must not just "decide" all issues, but must also "dispose" of them. The issue in those two cases was whether an order granting summary judgment in favor of the defendant, but not dismissing the defendant from the case, is a final order for purposes of appeal? The Court held that it was NOT, holding that a final order must contain an explicit statement either dismissing the entire matter in litigation or adjudging the entire matter in litigation as to one or more parties. The Court further added that "appellate courts should liberally construe ambiguities to preserve the right of appeal. In the two cases before it, the Wisconsin Court concluded by distinguishing "deciding" from "disposing" in the two cases.

This same reasoning and result provides guidance and supports petitioner in the present case, where the District Court did not decide and dispose of all the cases that it had before it that were to be decided together, which it did not do. The subject Order is, therefore, not Final for appeal purposes and the case should be reversed and/or remanded back to the District Court.

CONCLUSION

The new cases cited support petitioner on the issues presented and further show from the recent decisions the sharp discrepancy of the actions taken in this case.

To leave these rulings as they now stand creates a drastic conflict with established law of the Fourth Circuit as well as that of other circuits. If left uncorrected, it will create further discrepancies when cited in other cases. The enormous burden to this petitioner by these rulings as contrary to existing law further requires that justice be served in addressing the errors cited. Petitioner submits this may be a matter for the Court's Summary Reversal or Summary Remand docket due to the clear errors on these points in the Record and for which full briefing and oral argument before this Court might not be necessary or appropriate.

Respectfully submitted,

MICHAEL J. MORRISSEY
Petitioner.

TABLE OF APPENDICES

Appendices to the Petition for Rehearing are the same Appendices A-E as previously filed, and presented at pages 1a - 115a of petitioner's Petition for Writ of Certiorari. That appendix is incorporated herein by reference.

CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.

Michael J. Morrissey
Petitioner